APPENDIX "A"

Opinion of the California Supreme Court

[As filed May 29, 1961 and notified in Bank June 21, 1961]

SCANDINAVIAN AIRLINES SYSTEM, INC. (a Corporation), Respondent, v. COUNTY OF LOS ANGELES et al., Appellants.

[On hearing after decision by the District Court of Appeal, Second Appellate District, Division Two, Civ. No. 24265 (183 A.C.A. 69, 6 Cal.Rptr. 694) reversing with directions judgment of the superior court. Judgment affirmed.]

APPEAL from a judgment of the Superior Court of Los Angeles County. Philbrick McCoy, Judge. Affirmed.

Action by owner of foreign owned and registered aircraft to recover property taxes leived by both a city and county against airplanes flown exclusevely in foreign commerce. Judgment for plaintiff affirmed.

Harold W. Kennedy, County Counsel, and Alfred Charles De Flon, Deputy County Counsel, for Appellants.

Musick, Peeler & Garrett, Elvon P. Musick, Roderick M. Hills, Richard D. Esbenshade and Kenneth E. Scott for Respondent.

Condon & Forsyth, Darling, Shattuck & Edmonds, Cyril H. Condon, Hugh W. Darling, Rodolley, James J. Conran, Pillsbury, Madison & Sutro, D. Mackenzie, Foley, James & Conran, Frank J. Foley, James J. Conran, Pillsbury, Madison & Suntro, Turner H. McBaine, Noel Dyer, Chapman, Walsh & O'Connell, Joseph J. O'Connell, Jr. and Arthur K. Mason as Amici Curiae on behalf of Respondent.

PETERS, J.—Defendants, the County of Los Angeles and the City of Los Angeles, have appealed from a judgment requiring them to refund to the plaintiff certain personal property taxes which were levied against plaintiff's foreign owned and based aircraft flown exclusively in foreign commerce, and which utilized Los Angeles International Airport as their sole United States terminus. The United States Supreme Court, and the highest courts of the several states, have spoken with apparent finality regarding the right to tax and the method of taxation of ocean-going vessels engaged in both foreign and interstate commerce, and the courts have had occasion to determine similar questions involving aircraft engaged solely in interstate commerce (*Northwest Airlines v. Minnesota*, 322 U.S. 292 [64 S.Ct. 950, 88 L.Ed. 1283, 153 A.L.R. 245]; *Braniff Airways, Inc. v. Nebraska State Board of Equalization*, 347 U.S. 590 [74 S.Ct. 757, 98 L.Ed. 967]; *Slick Airways Inc. v. County of Los Angeles*, 140 Cal.App. 2d 311 [295

P.2d 46]), and domestically owned and based airplanes engaged in foreign commerce (*Flying Tiger Line, Inc. v. County of Los Angeles*, 51 Cal.2d 314 [333 P.2d 323]). However, the precise problem presented here, wherein the airplanes sought to be taxed locally are: (1) foreign owned, (2) foreign based and registered, and (3) flown solely in foreign commerce with but a single United States port, has not as yet, insofar as we have been advised, been passed on by the appellate courts.

The facts are undisputed. Defendants' general demurrer to plaintiff's complaint was overruled, and the parties then stipulated that the material facts of the complaint be taken as true, that judgment be entered in favor of plaintiff, without necessity of further proof, and that defendants retain their right to appeal from such judgment. The following is a summary of the material allegations of the complaint:

1. Plaintiff operates an air line, solely in foreign commerce, between Copenhagen, Denmark, and Los Angeles, California. All of its airplanes are owned, based and registered in one of three Scandinavian home ports.[1] The service referred to is ren-

[1]For the purpose of this decision, plaintiff may be considered as the operator and owner of the mentioned airplanes. Actually, plaintiff is but the United States representative of a consortium of Danish Airlines, Swedish Airlines and Norwegian Airlines. The airplanes are individually owned by the respective members of the consortium, and are registered and based in Copenhagen, Stockholm and Oslo, respectively. For the purpose of their United States flights the European terminus of each is Copenhagen

dered under a permit granted by the United States Civil Aeronautics Board. The planes stop en route in Canada, but touch the United States only at Los Angeles International Airport.

2. During the period involved herein each of plaintiff's airplanes averaged eight round-trip flights per year, and remained at its Los Angeles terminus for less than 34 hours on each flight.[2]

3. None of the planes was physically present in Los Angeles (or in the United States) on the first Monday of March in the year for which taxes were levied.

4. Defendant County of Los Angeles assessed each of the airplanes upon an "apportionment" basis, by means of a formula which was intended to determine that portion of the airplane's value measured by the period during which it was physically present in the county. Such formula added one hour "flying time" per trip, to the actual time spent on the ground in Los Angeles, and divided this figure into the total hours in the tax year. Based upon the assessment so calculated, defendant county levied a personal property tax on each of the airplanes on its own behalf, and upon behalf of the defendant city.

[2]Although the complaint is silent in regard to the use to which each airplane is put during the balance of the year, it may be assumed that by far the greater portion of such period is devoted either to maintenance at its home port, to local transportation in its home country, or to international transportation in which California is not involved

5. During the period for which defendants levied such tax, each of the airplanes was taxed, on an unapportioned basis, in its home port.[3]

6. No foreign country levies a property tax on aircraft operated by any United States air line flying planes in foreign commerce.[4]

7. The taxes levied by defendants constitute double taxation.

8. Plaintiff's operations in making the Copenhagen-Los Angeles flights are subject to extensive regulation by the United States government (17 specific regulatory measures being alleged), and the United States is party to 19 separate, and specifically alleged, international treaties directly or indirectly regulating and affecting such operations.

9. Plaintiff paid the taxes demanded by defendants, under protest, and subsequently filed a claim for refund.

The pleadings raise no issue regarding the propriety of the procedures taken on the claim for refund, and plaintiff does not question the formula by which defendants "apportioned" the tax. Hence the sole question involved is the validity of the tax.

[3]Denmark, Sweden and Norway each taxed the "operations" of their respective nationals which operated airplanes based in those countries, and Norway levied a property tax on the entire value of those planes which were registered and based in Oslo.

[4]Although not alleged in the complaint, it is argued by respondent, and not denied by appellants, that such reprisal taxation is now being threatened in several foreign countries.

Because of their interest herein, most of the foreign airlines serving California have filed amici curiae briefs.

Contentions of the Parties:

In support of the judgment, plaintiff contends that: (1) the commerce clause of the United States Constitution prohibits the levy of this tax; (2) the tax is further prohibited by the due process clauses of both the federal and California Constitutions; and, (3) there is no California statutory basis for this taxation.

In support of its first contention—conflict with the commerce clause—plaintiff makes a three-fold argument. First, it claims that since there is no relevant distinction between aircraft flying the international skies and ocean-going vessels plying the high seas, the former should be subjected to the same "home-port" doctrine of taxation which the United States Supreme Court has applied to the latter. Second, plaintiff claims that taxation of aircraft based and owned in a foreign country is a matter of international concern within the exclusive jurisdiction of the federal government (citing various federal regulatory acts and international treaties alleged to control). Its final argument in regard to the commerce clause is that "apportioned taxation" by California, together with unapportioned taxation by the government of the aircraft's home port, conflicts with the commerce clause in that it imposes double taxation, and places a far heavier

burden upon such foreign aircraft than exists in the case of aircraft owned domestically.

Plaintiff bases its second contention—repugnancy to the due process clauses—upon the claim that its airplanes have not acquired a taxable situs in California.

Its third contention is predicated upon the argument that California's constitutional and general statutory provisions for taxation of the various forms of personal property do not contemplate the taxation of aircraft owned and based in foreign countries and engaged in foreign commerce, and that without specific legislative authority these defendants are without jurisdiction to levy this tax.

Defendants contend that the commerce clause is inapplicable on several grounds. The first is that although that clause gives Congress the exclusive power to regulate commerce, such power is not denied to the several states until Congress has preempted the field, which defendants claim has not been done. The second is that taxation of personal property does not fall within that class of subjects which "admit only of one uniform system, or plan of regulation," which phrase has been applied as the test for exclusive legislation by the federal Congress. Defendants also claim that the decisions of the United States Supreme Court indicate a trend away from the "home-port" doctrine of taxation, and that if the question were to be submitted to that court today it would repudiate its former

rule. As a final reply to the contention that the commerce clause prohibits the instant tax, defendants argue that instrumentalities of commerce, by their very nature, acquire more than one taxable situs, and that the undue burden on commerce which would otherwise be imposed is properly avoided by a system of apportioned taxation in each such situs; that the undue burden, if any, imposed on the instant aircraft is not the result of defendants' apportioned tax, but results from the fact that the domiciliary situs has levied taxes on the full value.

Replying to plaintiff's contention that the due process clauses prohibit this tax, defendants contend that the sole test, insofar as due process is concerned, is whether the proposed tax has reasonable relation to the opportunities, benefits or protection conferred or accorded by the taxing state. Defendants then point out that an apportioned tax, based solely upon the percentage of time which the property is actually within the County of Los Angeles, satisfies this test.

In meeting plaintiff's third and last contention (lack of statutory basis for the tax) defendants argue that the California Constitution fixes the liability of the property to taxation and the standard upon which it is based (i.e., in proportion to its value),[5] and that

[5]Article XIII, section 1, provides: "All property in the State . . . not exempt under the laws of the United States, shall be taxed in propertion to its value . . . ."

the only further requirement is that the Legislature provide the machinery by which to ascertain such value (citing *McHenry v. Downer*, 116 Cal. 20 [47 P. 779, 45 L.R.A. 737], and *Crocker v. Scott*, 149 Cal. 575 [87 P. 102]). How, or in what manner, the Legislature has met this further requirement is not spelled out in defendant's briefs.

The "Home-Port" Doctrine:

As stated above, plaintiff's main contention in support of the judgment is that the tax imposed by defendants violates the commerce clause of the United States Constitution. Its first point in support of this contention is that the United States Supreme Court has clearly prohibited such state taxation in a line of decisions enunciating the "home-port" doctrine. By a series of opinions, covering a period of over a hundred years, that court has developed a body of law dealing with the power of local authorities to levy property taxes on instrumentalities of commerce which are transitory in character, and, in the course of engaging in trade, come within the territorial limits of one or more of the states of the Union. In each of the decisions embraced in that body of law, the United States Supreme Court has emphasized the importance of the true domicile, the port of registration, or home port, of the particular instrumentality sought to be taxed. It should be noted that in determining the validity or invalidity of a particular tax in light of this doc-

trine, the Supreme Court has not confined itself to a discussion of the commerce clause, but has also predicated its decision on the impact of the due process clause on such taxation.[6] But if a decision in this case is controlled by principles heretofore announced by the federal courts, it makes little difference whether those principles were predicated upon one constitutional ground or another. The task with which we are faced was well stated in the Northwest Airlines opinion *(supra)* as follows: "The answer involves the application of settled legal principles to the precise circumstances of this case." Thus, it is our duty to determine what "settled legal principles," if any, are applicable to the tax here under consideration. If that determination leads to the conclusion that the "home-port" doctrine is applicable herein it is our duty to so declare, not only because the United States Supreme Court has spoken with finality in a field which is peculiarly federal in nature, but because such principles have been definitely settled, and should not be overruled except for most compelling reasons which do not here exist. It should also be noted that the basic principles which

---

[6]The earlier decisions dealing with the "home-port" doctrine appear to be based upon the commerce clause, in that they refer to an area of commerce subject to the "laws of the general government, to which belongs the regulation of commerce with foreign nations and between the states." (*Hays v. Pacific Mail Steamship Co.*, 17 How. (U.S.) 596 [15 L.Ed. 254].) Subsequent decisions, as will be noted below, base the doctrine squarely upon the due process clause by reason of lack of taxable situs in the taxing state. Still later, in *Northwest Airlines v. Minnesota, supra*, 322 U.S. 292, the court held the question to involve both the commerce and the due process clauses, and failed to indicate clearly on which the decision was predicated. See *State Taxation of International Air Transportation*, 11 Stan.L.R. 518, at p. 520.

will determine the applicability or inapplicability of the "home-port" doctrine have been enunciated by this court as well as by the United States Supreme Court.

A reading of both the federal and state cases on the subject demonstrates that both courts have considered the subject to embrace a federal question without reference to any theory that it becomes such only when Congress pre-empts the field by enacting legislation. In fact, the basic decisions (both federal and state) have declared the "home-port" doctrine (and hence the invalidity of a proposed tax) although the federal legislature has never spoken on the subject. Inherent in the opinions, even when unstated, is a concept of the dual nature of a port of entry. Thus, Los Angeles International Airport is, on one hand, an integral portion of the city, county and state, subject to the sovereign powers thereof, and on the other hand is a port of entry to the United States. In its latter capacity its actions must be viewed as they may affect commerce with foreign nations. Such view poses federal questions even in the absence of Congressional enactment.

As early as 1851 taxing authorities in California attempted to levy property taxes on vehicles of commerce that touched temporarily in the various ports of this state. In 1854 the United States Supreme Court held, in *Hays v. Pacific Mail Steamship Co., supra*,

17 How. (U.S.) 596, that California could not tax an ocean going vessel, owned and registered in New York and operating in interstate commerce between that port and various ports in California and Oregon. The decision announced the rule that such a vessel might be taxed at its full value in its home port, and that the other states where it engaged in commerce were not entitled to levy a property tax of any nature, even though the vessel made regular stops therein for the purpose of discharging or taking on passengers and cargo, and remained on each trip for repairs and maintenance, and to await announcement of the next voyage. The decision was predicated in part upon the lack of a taxable situs in any but the "home-port", and held that such vessels enter the ports of other states, "*independently of any control over them, except as it respects such municipal and sanitary regulations of the local authorities as are not inconsistent with the constitution and laws of the general government, to which belongs the regulation of commerce with foreign nations and between the states.*" (17 How. (U.S.) at p. 598, emphasis added.) The opinion failed to mention any specific constitutional provision or federal law with which the attempted tax was in conflict. The reference to the lack of taxable situs gives credence to the claim that the doctrine was placed, in part at least, upon the due process clause. However, the statement to the effect that regulation of foreign and interstate commerce belongs to the federal government, indicates

that the court also predicated the doctrine, in part, upon the commerce clause, *even in the absence of any federal legislative enactment on the subject.* This theory is bolstered by the fact that the opinion also stated that a vessel plying the high seas in interstate commerce is subject to admiralty law, even when lying in a domestic port other than that of her registry, and as such differs from vessels which remain wholly within national waters. Thus, the rule appears to have been further predicated upon a concept that a vessel which sails upon international waters must be subjected to different rules than one which never leaves national waters. This appears to be the only logical explanation for holding that an instrument of interstate commerce is immune from state control or taxation in the absence of any showing that the Congress has entered the field.

Thus, the earliest statement of the "home-port" doctrine granted the state of domicile the power to tax in full, and denied to all other jurisdictions any power or right to tax except as might arise under the police power, when a vessel engaged in either interstate or foreign commerce used the open seas as a highway between ports.

Since that date, the rule of the Hays case has been extended and modified, to fit different situations, but insofar as we have been able to determine, it has never been overruled. In fact, the court has specifically

stated, as will be noted below, that certain of the limitations subsequently placed upon the rule were not to be deemed as altering the doctrine as applied to ships plying international waters.

California thereafter accepted and applied the doctrine as announced in the Hays decision(*City and County of San Francisco v. Talbot*, 63 Cal. 485, 488-489; *Olson v. City and County of San Francisco*, 148 Cal. 80, 82-83 [82 P. 850, 113 Am. St. Rep. 191, 7 Ann. Cas. 443, 2 L.R.A. N.S. 197]; *California etc. Co. v. City & County of San Francisco*, 150 Cal. 145 [88 P. 704]; *Sayles v. County of Los Angeles*, 59 Cal. App.2d 295 [138 P.2d 768], and other cases).

In 1870 the "home-port" doctrine was extended to vessels engaged in interstate commerce, and plying exclusively inland waters (*St. Louis v. Ferry Co.*, 11 Wall. (U.S.) 423), but such extension was overruled in 1948. (See *Ott v. Mississippi etc. Barge Line*, 336 U.S. 169 [69 S. Ct. 432, 93 L.Ed. 585].)

At a very early date the United States Supreme Court held that the doctrine, denying to jurisdictions other than that of domicile the power to impose property taxes, was *not* dependent upon actual taxation in the "home-port" (*Morgan v. Parham*, 16 Wall. (U.S. 471, 478 [21 L.Ed. 303]). By such desision, the United States Supreme Court inferentially held that the "home-port" doctrine was not based so much upon multiple taxation (which would clearly constitute a bur-

den upon commerce in derogation of the commerce clause), as it was upon a concept of exclusive federal jurisdiction once an instrumentality of commerce left its home port for international waters. Viewed in light of the rule (established by the same court in *Cooley v. Board of Wardens of Port of Philadelphia*, 12 How. (U.S.) 229 [13 L.Ed. 996]) that the commerce clause does not prohibit the states from regulating commerce except in those fields wherein the federal congress has acted or those fields which admit only of one uniform system, it must be assumed that the authors of the "home-port" doctrine held that taxation of a vessel which arrived in port via international waters falls within one of the two stated exceptions. Since it was not contended that Congress had acted in regard to such matters, it follows that taxation (except in the home port) of vessels sailing upon the high seas was within the latter classification. As the court stated in the Cooley opinion: "Whatever subjects of this power [to regulate commerce] are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress." (12 How. (U.S.) at p. 319.)

During the process of interpreting the "home-port" doctrine the courts carefully distinguished between the home port in its true sense (domicile of owner or permanent domicile of vessel) and fictitious home ports created solely by registry (*St. Louis v. Ferry Co.*, *sup-*

ra, 11 Wall. (U.S.) 423; *Old Dominion Steamship Co. v. Virginia,* 198 U.S. 299 [25 S.Ct. 686, 49 L.Ed, 1059], *Ayer & Lord Tie Co. v. Kentucky,* 202 U.S. 409 [26 S. Ct. 679, 50 L.Ed. 1082]; *Southern Pacific Co. v. Kentucky,* 222 U.S. 63, 67 [32 S.Ct. 13, 56 L.Ed. 96]; *Olson v. City and County of San Francisco, supra,* 148 Cal. 80, 82 P. 850; *Sayles v. County of Los Angeles,* supra, 59 Cal. App. 2d 295; *Ships etc. Corp. v. County of San Diego,* 93 Cal. App. 2d 522 [209 P. 2d 143]. By such limitation, the courts prevented the possibility of a misuse of the doctrine by owners who would otherwise create a fictitions home port in order to escape taxation.

In 1890 the United States Supreme Court declared a distinction between vessels in interstate commerce and railroad rolling stock similarly engaged. In *Pullman's Car Co. v. Pennslyvania,* 141 U.S. 18 [11 S. Ct. 876, 35 L. Ed 613], it held that because rolling stock has no fixed situs, and travels over land, traversing and retraversing the various states, it must be treated differently for the purpose of taxation from ships which travel on international waterways, have a home port, and touch land only incidentally and temporarily. Quoting the earlier case of *Baltimore & Ohio R.R. Co. v. Maryland,* 21 Wall. (U.S.) 456 [22 L. Ed. 678], the court stated that interstate commerce on land is so dissimilar from interstate commerce on water that the two operations do not have the same aspects in reference to constitutional powers and duties of state

and federal government, *and that since vehicles of commerce by water are instrumentalities of communications with other nations, the regulation of them is to be assumed by the national Legislature* (141 U.S. at pp. 23-24).[7]

The distinction thus announced between vessels sailing the high seas and railroad stock traveling by land ultimately led to the "apportionment doctrine" of taxation as applied to the latter. Such doctrine, thereafter applied by both federal and California courts, authorizes property taxation in each jurisdiction into which a vehicle of interstate commerce enters (*American Refrigerator Transit Co. v. Hall*, 174 U.S. 70 [19 S.Ct. 599, 43 L.Ed. 899]; *Union Refrigerator Transit Co. v. Lynch*, 177 U.S. 149 [20 S.Ct. 631, 44 L.Ed. 708]; *Union Transit Co. v. Kentucky*, 199 U. S. 194 [26 S. Ct. 36, 50 L. Ed. 501]). Such cases, however, did not alter the original "home-port" doctrine as applied to vessels, whether sailing the high seas or exclusively inland waters. The doctrine remained applicable to all vessels which left the jurisdiction of a single state until 1948, when the United States Supreme Court had occasion to re-examine the rule. In the case of *Ott v. Mississippi etc. Barge Line*, *supra*, 336 U.S. 169, the court inferentially overruled the St. Louis decision, and held that there was no distinction insofar

[7]Again inferentially holding that the "home-port" doctrine is not predicated upon any present pre-emption of the field by the national Legislature

as the due process and commerce clauses are concerned, between railroad cars and vessels when each move between the states by exclusively inland routes. In upholding an apportioned tax by Louisiana on tugs and barges operating out of another state on the Mississippi River, it distinguished the former cases (which adhered to the "home-port" doctrine) on the ground that they involved ships sailing the high seas. As to those cases which had applied to the "home-port" doctrine of taxation to vessels plying only inland waters (presumably the St. Louis case) the court stated that for one reason or another the apportionment method of taxation had not been considered. Thus, the St. Louis case was overruled by implication. The decision would have been more precise had the court expressly overruled the St. Louis decision on the ground, only implied in the decision, that further analysis indicated that the very basis of the "home-port" doctrine (i.e., exclusive federal concern in regard to instrumentalities of communication with other nations) does not exist when the instrumentality does not leave the national boundaries. Of utmost importance, however, is the language of the Ott opinion (pp. 173-174) wherein the court said, "We do not reach the question of taxability of ocean carriage but confine our decision to transportation on inland waters." Thus, the limitation placed upon the "home-port" doctrine by the Ott decision does not rest upon whether the commerce is interstate or foreign, but upon whether the instrumentality stayed within the continental limits of the United States or

travelled in international waters. Probably the court in making this distinction had in mind the reasoning, originally expressed in the Hays case, that when a vessel sails the international seas it becomes subjected to the rules of admiralty law, even while at rest in a domestic port. In other words, the court held (without specifically stating) that an instrumentality of commerce which leaves the nation's shores becomes so peculiarly imbued with international characteristics that it would be unwise to allow any state but that of domicile to exercise sovereignty beyond that necessary under ordinary police powers.[*]

When the apportioned method of taxation was originally adopted (first as applicable to railroad rolling stock, and subsequently to ships operating exclusively on inland waters) the taxation was held to be valid if levied under any formula which was reasonably related to the use of the property in the taxing state, or to the benefits or protection conferred on the property by that state. But in *Southern Pacific Co. v. Kentucky, supra*, 222 U.S. 63, the court appeared to repudiate the doctrine of measuring the legality of the tax by the benefits or protection received. Because the case involved ocean-going vessels, subject to the

[*]Although it might have been more logical to have stated a distinction between interstate and foreign commerce it serves no real purpose to speculate on what the court might do if presented with the same problem today. Since we are here dealing with instrumentalities of foreign commerce, traveling international skies, the distinction, if any, between the two bases for the doctrine is moot herein

"home-port" doctrine, it cannot be said to be determinative of any rule or formula for taxing those instrumentalities which are subject to apportioned levies. Although we have found no case which requires the use of any specific formula, it appears that any method which a state uses to determine an otherwise legal apportioned tax must bear such relationship to time or use within the taxing state that the sum total of all apportioned taxes so levied by all state will not exceed one full ad valorem assessment. This conclusion is further strengthened by the ultimate announcement by the Supreme Court (predicated on due process) that: "The rule which permits taxation by two or more states on an apportioned basis precludes taxation of all the property by the state of domicile." (*Standard Oil Co. v. Peck* (1952), 342 U.S. 382, 384 [72 S.Ct. 309, 96 L.Ed. 427, 26 A.L.R.2d 1371].)

It was inevitable that the issue of full taxation at the home port versus apportioned taxation at each port of call would arise in regard to air transportation. Certain phases of that issue have been presented to both the United States Supreme Court and to the various appellate courts of this state; but insofar as we have been able to determine, the precise question involved herein has not been heretofore before any court.

The first United States Supreme Court case to consider the subject was *Northwest Airlines v. Minnesota* (1944), *supra*, 322 U.S. 292. That case involved a fleet

of airplanes owned and operated by a Minnesota corporation, registered with a city of that state as their home port, utilizing that city as their rest and overhaul base, and operating therefrom entirely in interstate commerce. The court held that a Minnesota property tax levied upon the entire fleet on a full ad valorem basis did not violate either the commerce clause or the due process clause. Even though the planes were known to be engaged in commerce in several other states (which might presumably tax them on an apportioned basis) the majority opinion held that taxability by such other states was not before the court. Thus, although the Northwest case authorized the full ad valorem tax in the state of domicile, it cannot be said to have applied the "home-port" doctrine to interstate aircraft. Neither can it be taken for authority that apportioned taxes may be levied on such instrumentalities in each state. The apparent inconsistency of the language (inferring that both full ad valorem tax and apportioned tax might be possible under some circumstances) may be explained by the fact that the case preceded, by eight years, the Standard Oil case which put an end to such possibility. At least, such was the basis on which the court later explained the decision. (See Braniff Airways case, 347 U.S. 560, *infra*.) A more substantive question arises from the fact that the Northwest decision did not give consideration to those cases wherein it had previously held that instrumentalities of interstate commerce which do not leave the continental limits

of the United States will be taxed on an apportioned basis in each state visited. (*Ott v. Mississippi etc. Barge Line, supra*).[9] Analyzed in light of subsequent decisions, the Northwest case stands only for the proposition that domestic airplanes, flying exclusively in interstate commerce, and not leaving the continental limits of the United States, may be taxed at their home port on a full ad valorem basis if the parties do not urge the possibility of taxation elsewhere. It cannot be held to be a final determination of whether the full ad valorem tax or an apportioned tax is proper when all the facts are known; and it is no manner a determination of the basis for taxation of airplanes engaged in either interstate or foreign commerce and which fly outside the limits of the country. It is certainly not authority of any kind regarding foreign owned and based airplanes flying exclusively in foreign commerce.

Taxation of airplanes was next presented ten years later in *Braniff Airways v. Nebraska State Board of Equalization* (1954), *supra*, 347 U.S. 590. In that decision the court authorized an apportioned tax by

[9]The authorization of a full ad valorem tax in the jurisdiction of domicile follows the original "home-port" doctrine as the same stood before it was modified to exclude vehicles of interstate commerce which do not leave inland routes. The various inconsistencies inherent in the decision are not surprising when it is noted that the court was unable to muster a majority to a single opinion, and that the decision consisted of a majority opinion by three justices, concurred in by two separate opinions of single justices, together with a dissenting opinion of four (making four separate and distinct opinions). Only the dissenting opinion discussed the relation between taxation of ocean-going vessels and other interstate vehicles as applied to airplanes.

Nebraska on plaintiff's airplanes which were domiciled elsewhere, but which were engaged in interstate commerce in Nebraska. The case did not involve foreign commerce, and the planes did not leave continental United States. The court predicated the decision on taxable situs in Nebraska (due process) and held that since there was no demonstrable burden on interstate commerce, the commerce clause was no bar. In order to set at rest the inconsistencies of the Northwest decision, the court said, 347 U.S. at p. 602: "When *Standard Oil Co. v. Peck* . . . was here, the Court interpreted the Northwest Airlines case to permit states other than those of the corporate domicile to tax boats in interstate commerce on the apportionment basis in accordance with their use in the taxing state. We adhere to that interpretation."[10] The Northwest and Braniff cases (taken together with the intervening Standard Oil decision) therefore stand only for the proposition that airplanes, flying solely in interstate commerce, and not crossing international boundaries, are to be treated (for the purpose of taxation) in the same manner as vessels engaged in similar commerce via exclusively inland waters. The language and rationale of the decisions create the inference that, should the United States Supreme Court be presented with a situation involving airplanes engaged in foreign com-

[10]Perhaps it would have been clearer had the court frankly admitted that the apportioned doctrine of taxation was not urged by the parties in the Northwest case, and hence the court had failed to consider its impact upon their decision therein.

merce, or planes engaged in interstate commerce via international routes,[11] it would apply the same doctrines as it has consistently applied to oceangoing vessels similarly engaged.

Two years subsequent to the Braniff decision the question of taxation of airplanes was presented in California, in *Slick Airways v. County of Los Angeles, supra,* 140 Cal.App.2d 311.[12] In that case the parties conceded that Los Angeles County was entitled to tax, on an apportioned basis, a fleet of airplanes owned by a Delaware corporation and operated in interstate commerce between airports in various states, including Los Angeles. The only issue was whether Los Angeles was entitled to tax on a full ad valorem basis a single airplane which plaintiff purchased in that county and which it kept therein for the purpose of conducting "shakedown" flights prior to adding it to the fleet. The court held that such facts did not give the airplane such permanent situs in Los Angeles as would preclude taxation on an apportioned basis elsewhere, and that defendant county was therefore without the power to levy more than an apportioned tax. From the point of view of its place in this review of the growth of the doctrines governing taxation of instruments of commerce, the case is important only in that it is the first California decision in which there was an opportunity to determine the status of airplanes. The opinion fol-

[11]As between Alaska and other states of the union, with stops in Canada, or as between Hawaii and the mainland.

[12]Hearing by the Supreme Court was not requested.

lowed the lead of the United States Supreme Court by subjecting the airplane in question to the same doctrines which were applicable to ships similarly engaged. The decision does not purport to deal with taxation of airplanes engaged in flights outside of continental United States.

In 1958 this court decided *Flying Tiger Line, Inc. v. County of Los Angeles, supra,* 51 Cal. 2d 314, 333 P. 2d 323. Plaintiff, a Delaware corporation with its principal place of business in Los Angeles, operated airplanes in interstate commerce, as to which there was no issue.[13] It also owned five airplanes which it operated under the control of the United States military authorities on the Pacific airlift, in support of the war in Korea. In a four to three decision arrived at by a majority opinion of three, one other justice concurring in the result, the court held that a full ad valorem tax on such planes was improper, and plaintiff was granted the only relief which it sought, i.e., refund of the difference between the tax paid on the full ad valorem basis and a tax calculated on an apportioned basis. The dissenting opinion expressed the view that since it was not shown that the property was subject to taxation elsewhere, it should be subjected to a full ad valorem tax in California.[14] None of the three opinions dis-

[13]The interstate planes were taxed on an apportioned basis, and were not involved in the action before the court.

[14]The dissent acknowledged that multiple taxation would be unconstitutional as a burden in violation of the commerce clause, but predicated its argument on the lack of evidence that the planes might be taxed elsewhere; thus avoiding conflict with the established rule that power to tax elsewhere rather than actual taxation, is controlling

cussed the impact of the "home-port" doctrine as it might be applicable to airplanes flying international skies. The authorities relied upon by the majority (*Northwest Airlines; Ott v. Mississippi etc. Barge Line; Standard Oil v. Peck; Braniff Airways*, and *Slick Airways*, all *supra*) were all cases involving instrumentalities of interstate commerce which did not leave the continental limits of the United States. By placing reliance on these decisions, the majority seemed to have been of the view that the Flying Tiger airplanes were to be treated as if they were engaged in interstate commerce. The case cannot be considered authority for the proposition that airplanes flying only in foreign commerce will be taxed on either the "home-port" or the apportioned basis.

From the foregoing summary of United States and California decisions dealing with the "home-port" versus apportioned doctrines of taxation of instrumentalities of commerce, certain conclusions may be drawn. These are the "settled principles" which determine the validity or invalidity of the instant tax, and may be stated as follows:

1. Although movable personalty is generally held to be taxable only at its owner's place of residence, it may attain tax situs different from such place by reason of permanency of location or use within the taxing jurisdiction;

2. The basis for such alternative tax situs must be a reasonable one, and cannot be supplied by ar-

bitrary acts of the owner, taken for purposes of tax avoidance;

3. Ocean-going vessels, plying international waters, engaged in either interstate or foreign trade, even when owned by residents or citizens of this country, may not be taxed by any jurisdiction other than that of their home-port, as such is defined above; and the jurisdiction of domicile may tax such instrumentalities on a full ad valorem basis;

4. The denial of taxing power to the nondomiciliary states does not depend upon the actual fact of taxation at the domicile, but is based upon the proposition that instrumentalities of communication with other nations comprise a field which admits of but one uniform system of regulation, which by its very nature must be exclusively federal;

5. Because of the exclusively federal nature of the field, it makes no difference that the Congress has not acted in the field of taxation of such instrumentalities.

6. Because the proposition stated as (4, above, does not apply to them, instrumentalities of interstate commerce which do not leave United States (such as railroad rolling stock and vessels plying inland waters, only) may be taxed in each jurisdiction wherein they are engaged in commerce;

7. In order to avoid a burden on commerce, the various jurisdictions authorized to tax under the last

stated principle must confine themselves to a levy on an apportioned basis, related to the time or use within the jurisdiction, rather than to the benefits conferred, in order that the total taxes so assessed shall not amount to more than one single ad valorem tax;[15]

8. It follows that the right of one such jurisdiction to tax on an apportioned basis precludes the right of the jurisdiction of domicile to tax on a full ad valorem basis;[16]

9. Since said pratice would do violence to the principles stated above, the furnishing of benefit and protection, standing alone, does not confer on any jurisdiction the power to tax an instrumentality of commerce unless the instrumentality falls within the class of property which may be taxed according to the stated principles;

10. Airplanes flying solely in interstate commerce, and based in the United States, or owned by domestic concerns, and which do not leave the jurisdictional limits of the United States, will be taxed under the same principles which apply to other instrumentalities of interstate commerce.

Neither state nor federal courts have as yet been called upon to determine the application of these principles to domestically owned and based airplanes fly-

[15]Obviously, this rule can only be enforced within the United States where the Supreme Court may act as arbiter between the several jurisdictions.

[16]See footnote 15, *supra*

ing in foreign commerce, other than in the Flying Tiger case, which, for the reasons already discussed, is not here controlling. Nor has there been any occasion (prior to the instant case) to determine the applicability of such principles to foreign owned and based airplanes operating solely in foreign commerce and touching only one port in the United States.

It could be held that the instant case is controlled by the "home-port" doctrine which has been uniformly applied by both state and federal courts for over a hundred years; that under that doctrine no jurisdiction, other than that of the true domicile, may tax instrumentalities of communication engaged in foreign commerce; and that airplanes, flying the international skies, do not differ substantially from vessels sailing the international seas. If these conclusions are sound, then, under the doctrine of *stare decisis*, the judgment of the trial court should be affirmed.

But, because the precise question here involved has not yet been passed upon by the federal courts, we think we should also decide the question on principle. The question is, should the "home-port" doctrine, as a matter of principle, be applied to the facts of the instant case?

We think that that doctrine should be so applied. The prior cases, while they have not decided the precise point here involved, have laid down a very definite pattern of constitutional law which we think is sound

and controlling. It certainly has been established that any instrumentality of commerce is subject to taxation in its true domicile. But this power to tax is subject to limitations as to the manner of taxation when a taxable situs has been acquired in another jurisdiction. The need for such limitation arises from the necessity of protecting against double taxation. Thus the instrumentality which, by reason of being engaged in interstate commerce, gains taxable situs in two or more states, is subjected to taxation on an apportioned basis only; and that fact limits the right of the domicile to impose a full ad valorem tax. But, by reason of other considerations, not every instrumentality of commerce may gain more than a single tax situs. When such a vehicle becomes an instrument of communication with foreign nations it is apparent that the apportioned basis of taxation is unworkable because the courts of this country can exercise no control over the foreign taxing authorities. The matter then should become an exclusively federal one. To this extent we agree partially with the appellants herein who state in their briefs on file that: "State taxation of the planes of foreign air carriers involves international political and economic problems which the courts are incapable of satisfactorily resolving. Decision of whether the states should have the power to tax planes of foreign air carriers engaged in foreign commerce should be left exclusively with the executive and legislative branches of the federal government." Of course, ap-

pellants' quoted statement was made in support of the argument that we are unable to act in contravention of the tax. We cannot agree with that conclusion. We do, however, find in their statement solid ground on which to hold that the exclusively federal nature of the field requires us to apply the "home-port" doctrine, and thus to hold that no jurisdiction save that of domicile has any authority to levy a personal property tax on these airplanes. There is no logical basis for holding that these airplanes differ from other instrumentalies of communication with foreign nations, so as to avoid that doctrine. As the vessel which sails the seas is subject to admiralty law, airplanes flying international skies are subject to all manner of international aviation law. They are in no manner the equivalent of instrumentalities of commerce which travel exclusively between the various states of this country.[17] In our opinion, the basic reasoning behind the controlling principles is that any instrumentality which engages in commerce between two or more sovereign nations must have but one taxable situs. Common sense requires that such situs be the port where the instrumentality is in good faith domiciled.

[17]Such instrumentalities, be they ferry boats, tugs, motor vehicles or railroad rolling stock, remain for unlimited periods of time within the taxing state, utilizing the wharves, port facilities, rails, roads, streets and other facilities of the state, moving from point to point therein, loading and unloading at various points, and perhaps engaging in intra-state activities therein. They have therefore been considered to have gained a taxable situs in such state far beyond that which might be applicable to that of a ship or airplane which enters the state only at a port of entry to the United States, and which remains in such port until it again leaves the country. There appears to be no reason why the former should not be taxed in proportion to its semi-permanent sojourn in the state and its use of divergent facilities unconnected with those of the port of entry.

It is true that this conclusion does not explain the inclusion in the "home-port" doctrine of vessels plying international waters but engaged solely in interstate commerce. Such vessels were originally included in the doctrine on the ground that they never gained taxable situs in the port which they temporarily visited. The view expressed in this opinion would exclude them from the doctrine because, not being instruments of communication with a foreign country, they do not pose an exclusively federal question. This distinction, perhaps, can be explained on historical grounds. The fact that the courts have not announced a change in the "home-port" doctrine to the extent of excluding such vessels may be attributed to the fact that no case involving such an instrumentality of commerce has been brought before them in recent times. As a matter of principle it should be held that both seagoing vessels and airplanes engaged solely in interstate commerce are subject to the apportionment theory of taxation, regardless of utilization of inland or international routes. But even if it were so held, such holding would not affect the status of instrumentalities engaged in commerce with foreign nations. Whether they be sailing vessels, steamships or airplanes, they are in a different category. In our opinion, being instrumentalities of communication with foreign nations, they remain subject to the "home-port" doctrine and are not taxable anywhere but in the jurisdiction of their domicile. They enter the territory of a given state for the sole

purpose of utilizing a port thereof as a port of entry to the United States. In this respect there is no distinction between a ship or an airplane when both engage in commerce between nations. Both are amenable to international law and agreement. Each may be fully taxed in its home port in such manner as the laws of the domicile provide, and those laws are not subject to review by the courts of the nation in which the non-domiciliary port is located. Otherwise double taxation would inevitably result. In the language of the Hays case, each must be considered to enter the non-domiciliary port "independently of any control over them, except as it respects such municipal and sanitary regulations of the local authorities as are not inconsistent with the constitution and laws of the general government to which belongs the regulation of commerce . . ."

A somewhat analogous situation has been discussed in those cases involving the second and third clauses of section 10 of article I of the United States Constitution.[18] In reviewing attempts by various ports of entry to levy charges against ships entering their harbors, the federal courts have held such charges to be valid whether the ship or its owner was domiciled within the taxing authority *The North Cape* (N.D. Ill.

[18]The pertinent language provides:

"[cl. 2] No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection laws

"[cl. 3] No State shall, without the Consent of Congress, lay any Duty of Tonnage

18 F.Cas. 342), or when the charge was imposed for the use of wharves or other facilities, as distinct from a general tax (*Vicksburg v. Tobin*, 100 U.S. 430, 433 [25 L.Ed. 690]; *Clyde Mallory Lines v. Alabama*, 296 U.S. 261 [56 S.Ct. 194, 80 L.Ed. 215]). But the federal courts have held such charges to be invalid when they constituted an attempt to levy a property tax on instrumentalities of commerce not domiciled therein. (See *Gibbons v. Ogden*, 9 Wheat. (U.S., 89 [6 L.Ed. 23]; *Packet etc. Co. v. Keokuk*, 95 U.S. 80 [24 L.Ed. 377]; *Peete v. Morgan*, 19 Wall. (U.S.) 581 [22 L.Ed. 201]; *State Tonnage Tax Cases*, 12 Wall. (U.S.) 204 [20 L. Ed. 370].) The rationale of those cases appears to be that: a duty of tonnage imposed upon an instrumentality of commerce (i.e., the carrier as distinct from the cargo) which is not owned or domiciled within the state, and which duty is not a charge for a specific service rendered, amounts to a duty levied as a condition to being allowed to enter or leave port; such a duty represents an interference with commerce; and, no state is at liberty to interfere with foreign commerce. The fact that the present case involves an ad valorem tax rather than a tax based upon tonnage of vessel does not alter the underlying principles. While valuation may be used as a basis for taxing an instrumentality of commerce when the owner is a resident, or when the instrumentality has otherwise acquired a taxable situs, the power to so tax is based upon the right to tax the person upon his financial investment (*Trans-*

portation Co. v. Wheeling, 99 U.S. 273, 279 [25 L.Ed. 412]). If the charge attempted to be imposed is one which, by the terms of the statute or ordinance imposing it, may become due from an instrumentality of foreign commerce without any services being rendered to it, or without the enjoyment of special benefits, and from the mere fact that it has arrived in a port of the state, it is a charge on tonnage, and therefore not collectible (48 Am. Jur., § 651, p. 454, citing various federal cases as well as this court's opinion in *Oakland v. E. K. Wood Lumber Co.*, 211 Cal. 16, 292 P. 1076). There is no logical reason why the stated principles should apply only if the proposed tax is based upon the gross tonnage of a vessel, and be inapplicable if the same tax is based upon the vessel's value. Those principles are equally applicable as a basis for applying the "home-port" doctrine to airplanes flying exclusively in foreign commerce and utilizing a port of this state as a port of entry to the United States.

In attacking the "home-port" doctrine as here applied, defendants urge several arguments. They contend that the real basis for distinguishing between vessels sailing the high seas and those plying only inland waters is not a commerce concept at all and that it springs solely from the common law concepts of admiralty which are not necessarily applicable to airplanes. Such an argument overlooks the fact that the vessels between which such distinction was made were all engaged in interstate commerce, and that here we

are dealing with instrumentalities of foreign commerce. Another answer to the argument is that since the advent of the airplane there has developed an equally large body of international air law, which, when substituted for the admiralty concepts, provides equal reason for considering international air flights on the same basis as vessels sailing international waters.

Defendants also urge the apparent trend of the United States Supreme Court in declaring more and more exceptions to the application of the rule as first announced in the Hays decision. This, they argue, indicates a definite attitude in opposition to the "home-port" doctrine. They claim that if the higher court were given the opportunity today, it would repudiate the entire rule as contrary to modern theories of taxation. One answer to this proposition comes from the United States Supreme Court itself. As mentioned above, in our analysis of the growth of the doctrine, in 1948 that court excluded vessels utilizing only inland waters from the application of the "home-port" rule (*Ott v. Mississippi etc. Barge Line, supra,* 336 U.S. 169). In so doing, it expressly refrained from making the decision applicable to interstate vessels traversing the open seas. Why, then, should we anticipate a change in regard to instrumentalities of foreign commerce, as to which there is greater cause to apply the doctrine? If, as is argued, that court is about to reverse itself, it is not for us to anticipate such action. At this point we would not consider a request to hold that a steamship plying the high

seas in foreign commerce is to be excluded from application of the "home-port" doctrine. We should not be expected to do so in regard to an airplane similarly engaged, when the controlling principles (and reasoning behind them) are equally applicable. We therefore hold the "home-port" doctrine to be applicable herein, and that the power to tax airplanes engaged solely in commerce with foreign nations is vested exclusively in the place of true domicile, which jurisdiction may impose a tax on the full value, to the exclusion of property taxation elsewhere, whether upon an apportioned basis or otherwise.

Is the tax barred by federal regulation or international treaty?

This conclusion is sufficient to dispose of the case. But because we have elected to decide this case on principle as well as on the doctrine of *stare decisis* there are other considerations that should be considered. One is the impact, if any, of federal regulation and treaty on defendants' power to impose the instant tax. Admittedly, under the commerce clause of the United States Constitution, the Congress is given the power to legislate as to interstate and foreign commerce to the exclusion of the several states. If it has done so the tax here involved must be held to be invalid. Plaintiff does not cite us to any federal legislation which, by its nature, specifically excludes state taxation. The regulatory enactments which it pleads indicate that

Congress has pre-empted the field of regulating air traffic (both foreign and interstate) to the extent of protecting public safety, welfare, convenience and necessity. But none of the regulatory enactments indicate an intent to enter, or to bar the states from entering the field of taxation. Insofar as they should be considered herein, the federal regulations which have been called to our attention do not bar the tax imposed by defendants. They do, however, indicate the peculiarly federal nature of the entire field.

The international treaties upon which plaintiff relies pose a more difficult problem. They represent executive action, and although approved by the Senate (U. S. Const., art II § 2, cl. 2) are not the Congressional action contemplated by the commerce clause art I, § 8, cl. 3). But they are equally binding on the states. Treaties are the supreme law of the land, binding upon the courts of every state (art. VI, cl. 2). If the tax here under review is repugnant to the terms of any such treaty, the tax must be declared invalid.

Of the several treaties alleged in the complaint as regulating plaintiff's operations, three are of particular interest. These are: (1) "Convention and protocol between the United States of America and Sweden respecting double taxation," dated March 23, 1939, ratified August 2, 1939, proclaimed December 12, 1939, and effective January 1, 1940 (54 Stat. 1759, T.S. No. 958); (2) "Convention between the United States of

America and Denmark respecting double taxation . . ." dated May 6, 1948, and effective December 1, 1948 (62 Stat. 1730, T.I.A.S. No. 1854); and (3) "Convention between the United States of America and Norway for the avoidance of double taxation . . ." dated June 13, 1949 (2 U.S.T. [1951] pt. 2 p. 2323, T.I.A.S. No. 2357, and 2 U.S.T. [1951] pt. 2, p. 2353, T.I.A.S. No. 2358). These treaties, by their language, are aimed at the avoidance of duplication of taxation by the signatory powers, or by political subdivisions thereof, in cases where nationals of one signatory power are engaged in business in the territorial limits of the other power. It is also clear that they are intended to cover shipping and air traffic within the protected types of business ventures. The extent to which they go, particularly with reference to the types of taxation against which protection is afforded, is not clear. If reference is made to the titles, only, the treaties with Denmark and Norway would appear to be limited to taxes on income, estates and inheritances. Nothing in the title of the treaty with Sweden limits the type of taxes which is intended to be covered. The preamble of the latter states that the parties are "desirous of avoiding double taxation and of establishing rules of reciprocal administrative assistance in the case of income *and other* taxes. . . ." (Emphasis added.) Article I of the treaty sets forth a list of taxes (by general type rather than specific name) as the "taxes referred to in this Convention." In the case of the United

States the list includes federal income tax (including surtax and excess profits tax) and federal capital stock tax. In the case of Sweden income and property taxes are mentioned. As to both powers, the list includes "any other or additional taxes imposed by either . . . upon substantially the same bases as the taxes enumerated herein." If we were to read no further it might be assumed that the treaty does not apply to property taxes imposed by the several states of this nation. However, article XIII, without referring to the statements made in the preamble or in article I, provides that in regard to certain types of property *(specifically including air transport undertakings)* "taxes on property or increment of property . . . may be levied only in that contracting State which is entitled under the preceding Articles to tax the income from such property." Referring to such preceding articles, it is clear that neither nation may tax the profits of enterprises of the citizens of the other except as such profits are allocable to a permanent establishment in the taxing nation (art. II). Even more specific is the provision that income of an enterprise derived from the operation of a ship or aircraft shall be taxable only in the nation in which such ship or aircraft is registered (art. IV). Taking the treaty as a whole, we find that the United States and Sweden have agreed that each will refrain from taxing either the income of or the property belonging to the nationals of the other country except insofar as such

income is allocable to or the property is a portion of a permanent establishment in the taxing nation. Insofar as ships and air lines are concerned they have agreed to levy neither income nor property tax even where there is a permanent establishment, if such vehicle of commerce is not registered in the taxing nation. Since plaintiff maintains no permanent establishment in the United States, and one-third of its airplanes are registered and based in Norway, Sweden and Denmark, respectively, it follows that the instant tax, at least insofar as it is applied to the one-third of the planes registered in that country, is barred by the provisions of the treaty with Sweden.

Turning now to the treaties with Norway and Denmark, we find no such specific ban upon property taxes as appears in the Swedish treaty. However, article XVI of the Danish treaty provides that citizens of either of the contracting nations (including persons, partnerships, corporations, associations, etc.) while resident in the other contracting nation shall not "be subjected therein to other or more burdensome taxes than are the citizens of such other contracting State residing in its territory. As used in this paragraph . . . 'taxes' means taxes of every kind or description whether national, Federal, state, provincial or municipal." This article obviously expresses an intent to prevent a state, such as California, or a city or a county, such as the defendants herein, from levying a discriminatory tax against Danish nationals. It can be argued

that the apportioned property tax which defendants seek to impose upon these airplanes is the same tax which they impose upon all citizens (i.e., domestic air lines) of California or the United States. The fact remains, however, that such tax is a "more burdensome" tax than imposed upon domestic lines because the latter do not also pay ad valorem property taxes in Denmark.

Those Norwegian treaties mentioned above do not make specific reference to personal property taxes, but they do contain language which may be relied on for an argument that the federal government intended to relieve the Norwegian air lines from taxes such as are at issue here. The treaty dealing with income taxes provides that income which enterprises of either nation shall derive from the operation of ships or aircraft shall be exempt from taxation in the other contracting nation. The treaty concerning taxes on estates and inheritances, in providing for the taxable situs of movable property in general, makes a specific exception of ships, aircraft and shares thereof by providing that their taxable situs shall be the place of registration or documentation.

In addition to the formal treaties alluded to above, there are also in existence a series of executive agreements with each of the three countries, referred to as "Air Navigation Agreements," "Air Transportation Agreements," "Air Worthiness Agreements," "Pilot

License Agreements," etc. The various "Air Transportation Agreements" (Denmark—58 Stat. 1458, E.A.S. No. 430, amended 60 Stat. 1646, T.I.A.S. No. 1519; Norway—59 Stat. 1658, E.A.S. No. 482; Sweden—58 Stat. 1466, E.A.S. No. 431, amended 60 Stat. 1859 T.I.A.S. No. 1550) contain articles designed to "prevent discriminatory practices, and to assure equality of treatment," specifically prohibiting unequal charges for airport facilities, exemption from custom duties, etc., but none mentions taxation as such. On the one hand this fact tends to sustain an argument that the contracting parties did not intend to include taxation within the possible discriminatory practices which they sought to eliminate. On the other hand, it may be argued with equal force that since there had never been a tax of this type imposed on the dates of the respective treaties and agreements, the parties did not have the question of local taxes in mind, and would have included them as a prohibited method of discrimination had they existed. Certainly, it is within reason to infer that the foreign negotiators, unfamiliar with our dual federal-state system, may have assumed that once they had eliminated all possibility that the federal government would levy a double or multiple tax, there was nothing left to fear except the possibility of unfair discriminatory practices by airports and other non-governmental agencies.

In our opinion, the language of the various treaties and agreements clearly eliminates the possibility of

local property taxation only insofar as concerns those airplanes owned and registered in Sweden. As to that portion of the tax, the judgment of the trial court must be affirmed on this point alone. As to the remaining two-thirds of the airplanes, there remains considerable doubt as to the effect of the federal commitments, with only a possibility that the contracting states intended to prevent any taxation of any nature (local or otherwise) which would afford the domestic air lines of one country any advantage over those of the other country where such domestic and foreign lines may be in competition. The instant tax would discriminate in favor of any United States lines competing with these Scandinavian lines in commerce between the respective nations. But the mere possibility that the signatory powers may have so intended is not sufficient ground on which to invalidate that portion of the tax imposed upon the planes registered in Norway and Denmark. Because we cannot spell out such an intent in the treaties with those nations, we cannot invalidate the tax upon the ground that it is repugnant to the terms of *those* treaties. However, we have already determined that the tax is repugnant to the treaty with Sweden, and must be deemed invalid as to the airplanes based and registered in that country. Does this mean that defendants are prohibited from taxing Swedish airplanes, and yet free to tax planes operating in a similar manner, but owned and based in other foreign countries? We think not. Such

a situation would immediately create discrimination between foreign commerce based in a treaty country and similar commerce based in other nations. Such discrimination would constitute interference with the free flow of commerce. As said in *Northwestern etc. Comcat Co. v. Minnesota*, 358 U.S. 450, 458 [79 S.Ct. 357, 3 L.Ed. 2d 421, 67 A.L.R. 2d 1292], and in *Freeman v. Hewitt*, 329 U.S. 249, 256 [67 S.Ct. 274, 91 L.Ed. 265], the commerce clause denies to the states "one single-tax-worth of direct interference with the free flow of commerce." It is obvious that no individual state has power to discriminate between foreign nations. The principles of state sovereignty apply to internal matters, only. No state of this union is sovereign in the eyes of a foreign nation. A state cannot deal directly with a foreign nation by treaty or otherwise. This it must leave to the federal government. If its attempted actions in a given field would result in discriminatory practices as between two foreign nations, then it must eschew that field in its entirety. This is but another way of saying, as we said above, that taxation of foreign owned and based instruments of commerce represents a field that is peculiarly federal in nature, without regard to such specific constitutional considerations as the commerce clause or the due process clause, and which must be left to the administration of the federal government, even in the absence of any present federal legislation thereon.

For the reasons set forth, we are of the opinion that the terms of the treaty with Sweden prevent the several states from imposing any type of property tax upon airplanes owned, based and registered in *any* foreign country, unless the overall operations of the owner bring such airplanes within the area of property to be taxed, as such is defined in that treaty.

Additional issues urged by the parties:

The foregoing considerations are determinative of the matter. We expressly refrain from any decision upon plaintiff's contention that neither the California Constitution nor any statutory provision provides a basis for the instant tax. The balance of the arguments have been answered above, or have become moot by reason of the grounds upon which we base our decision.

It is significant that we have been cited to no instance wherein any state or political subdivision has ever attempted to levy a property tax upon an instrumentality of foreign commerce which was both owned and based in a foreign country. And this is true even though each of our major seaports is visited regularly by passenger liners and freighters, operating on regular schedules, in the same manner in which plaintiff's airplanes visit Los Angeles International Airport. All of the cases cited above dealt with vessels, airplanes, and other instrumentalities owned or based in this country. The entire lack of any case dealing with any

instrumentality owned or based elsewhere indicates that no state has ever attempted to tax foreign instrumentalities of commerce arriving within its jurisdiction solely in foreign trade. If, during the 185 years of existence of the United States such property has been assumed to be nontaxable, it makes little difference whether that belief stemmed from constitutional prohibitions or from considerations of policy. If such assumption were now to be overruled, we would open the doors to state taxation of every ocean vessel which, for 185 years, has been believed to be nontaxable. The repercussions would be world-wide. Retaliatory taxation would be inevitable. The states could not cope with such a situation. The only escape from such a result would be by holding that airplanes might be taxed under circumstances wherein a ship may not. No logical basis for such a distinction has been advanced.

The judgment is affirmed.

Schauer, J., McComb, J., and White, J., concurred.

DOOLING, J.—I concur in the judgment and with the conclusion that the existing decisions of the Supreme Court of the United States on the "home-port" doctrine as it relates to the right to tax vessels engaged in foreign commerce are binding upon this court. This phase of the "home-port" doctrine has never been modified or overruled and, if the doctrine is to be reexamined, the nation's highest judicial tribunal which announced it is the only court which can effectively

make such reexamination. Unless that court sees fit to do so, and this case might afford a handy vehicle if its Justices are so minded, I feel bound to follow the existing law in this field as declared by its earlier decisions.

TRAYNOR, J.—I dissent.

Neither the due process clause nor the commerce clause nor the tonnage clause of the United States Constitution precludes state taxation on an apportioned basis of aircraft flown in interstate commerce. (*Braniff Airways v. Nebraska State Board of Equalization*, 347 U.S. 590, 600 [74 S.Ct. 957, 98 L.Ed. 967]; see also *Flying Tiger Line, Inc. v. County of Los Angeles*, 51 Cal. 2d 314, 318 [333, P. 2d 323].) They do not preclude equivalent taxation of aircraft owned by foreign domiciliaries flown in foreign commerce.

"So far as due process is concerned the only question is whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing State. [Citation.] Those requirements are satisfied if the tax is fairly apportioned to the commerce carried on within the State." (*Ott v. Mississippi etc. Barge Line*, *supra*, 336 U.S. 169, 174; *Braniff Airways v. Nebraska State Board of Equalization*, *supra*, 347 U.S. 590, 600.) Since plaintiff's relationship to California is no different from that of airlines engaged solely in interstate commerce, and since the "opportunities, benefits, or protection con-

ferred or afforded" are not affected by the locations of plaintiff's out-of-state termini, the due process clause does not preclude the taxation of its aircraft.

Nor does the commerce clause or the tonnage clause[1] exempt the instrumentalities of foreign commerce from state ad valorem property taxes. (*Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196, 206 [5 S.Ct. 826, 29 L.Ed. 158]; *Old Dominion Steamship Co. v. Virginia*, 198 U.S. 299, 305-306 [25 S.Ct. 686, 49 L.Ed. 1059]; *Pullman's Palace Car v. Pennsylvania*, 141 U.S. 18, 22-23 [11 S.Ct. 876, 35 L. Ed. 613]; see also, *Transportation Co. v. Wheeling*, 99 U.S. 273, 279-280 [25 L. Ed. 412].) Once their situs is determined, a state may apply its own tax rate and collection procedures. It is idle here to discuss the pros and cons of national uniformity. It could be achieved only if the states were declared powerless to tax instrumentalities of foreign commerce at all or were empowered to tax them only pursuant to federal legislation.

The issue is whether there is discrimination against foreign commerce. Obviously there is no discrimination if a state taxes migratory property used in such commerce in the same way it taxes migratory property used in interstate commerce. Moreover, it precludes discrimination against interstate commerce. Plaintiff nevertheless contends that since the United States

[1]"No State shall, without the consent of the Congress, lay any Duty of Tonnage . . ." U.S. Const., art. I, § 10, cl. 3.)

Supreme Court cannot compel foreign countries to apportion their taxes by taking into account the absences from home of their domiciliaries' migratory property, taxation here even on an apportioned basis may lead to discriminatory cumulative burdens on foreign commerce. This argument erroneously attributes to such taxation the risk of discrimination. Actually it is attributable to the freedom of foreign countries, not permitted to our own states, to adopt rules of their own that can result in multiple burdens. The court cannot prevent foreign countries from taxing instrumentalities of foreign commerce owned by their domiciliaries even if those instrumentalities are permanently located here, just as it cannot prevent foreign countries from taxing American aircraft temporarily abroad even thought they have been taxed at full value at the domicile of their owners here. It is without power to compel independent nations to adopt a uniform nondiscriminatory system of taxation. It does not follow that the states must forego the power to impose taxes that are not in themselves discriminatory. It bears noting that Congress remains free to prohibit altogether state taxation of instrumentalities of foreign commerce. Alternatively, treaties could govern such taxation to preclude the risk of discrimination.

Plaintiff also contends that for purposes of ad valorem taxation, aircraft flying in foreign commerce are logically indistinguishable from ships sailing the high seas and hence taxable only at the domicile of their

owners. When the home-port rule was formulated for the taxation of ships in interstate as well as foreign commerce, there had yet to be developed the concept of taxation on an apportioned basis. (See *Ott v. Mississippi etc. Barge Line*, 336 U.S. 169, 173 [69 S.Ct. 432, 93 L.Ed. 585]; *Ayer & Lord Co. v. Kentucky*, 202 U.S. 409, 421 [26 S.Ct. 679, 50 L.Ed. 1082]; *Southern Pacific Co. v. Kentucky*, 222 U.S. 63, 69 [32 S.Ct. 13, 56 L.Ed. 96]; *St. Louis v. Ferry Co.*, 78 U.S. 423, 431-432; *Morgan v. Parham*, 16 Wall. (U.S.) 471, 478 [21 L.Ed. 303]; *Gloucester Ferry Co. v. Pennsylvania*, 114 U.S. 196, 206 [5 S.Ct. 826, 29 L.Ed. 158]; *Hays v. Pacific Mail Steamship Co.*, 17 How. (U.S.) 596, 597-599; *Old Dominion Steamship Co. v. Virginia*, 198 U.S. 299, 305 [25 S.Ct. 686, 49 L.Ed. 1059].) The rule was abandoned in favor of apportioned taxes as to vessels plying inland waters in *Ott v. Mississippi etc. Barge Line*, 336 U.S. 169 [69 S.Ct. 432, 93 L.Ed. 585]. (See also *Standard Oil Co. v. Peck*, 342 U.S. 382, 384 [72 S.Ct. 309, 96 L.Ed. 427, 26 A.L.R. 2d 1371].) In leaving open the question of ocean carriage, the court in no way suggested that the taxation of either ocean carriage or inland carriage would depend upon whether it was interstate or foreign commerce. Thereafter, in *Braniff Airways, Inc. v. Nebraska State Board of Equalization*, 34 7U.S. 590 [74 St.Ct. 757, 98 L.Ed. 967] when the analogy between the high seas bordering the nation and the airspace above the nation was urged against apportioned taxation of aircraft, the court

nevertheless held that aircraft flying in interstate commerce could be taxed on an apportioned basis. This court adopted the same rule with respect to aircraft flying in foreign commerce in *Flying Tiger Line, Inc. v. County of Los Angeles,* 51 Cal. 2d 314 [333 P. 2d 323]. (See also *Slick Airways v. County of Los Angeles,* 140 Cal. App. 2d 311, 315, [295 P. 2d 46].)

In the Flying Tiger case all members of the court agreed that aircraft flying in foreign commerce could not be taxed at full value at the domicile of the owner in California if they also had attained a taxable situs elsewhere. In contrast, the majority in the present case invoke the home-port doctrine for the conclusion that aircraft regularly flying into California from the foreign domiciles of their owners attain no taxable situs here and that taxation on an apportioned basis is therefore unconstitutional. Rationally, however, the home-port doctrine should apply to all aircraft regularly flying in foreign commerce or to none. If the home-port doctrine is applicable to all aircraft regularly flying in foreign commerce, the Flying Tiger case must be overruled.

The Braniff case broke away from the home-port doctrine when it upheld an apportioned tax on aircraft flown in interstate commerce. There is no more reason to invoke the doctrine for aircraft regularly flying in foreign commerce and bearing an identical relationship to the nondomiciliary state into which they fly. If as plaintiff contends, aircraft cannot logically be

distinguished from ships, it is the home-port doctrine, not the Braniff decision, that must give way.

Plaintiff contends, further, that the treaties between the United States and the Scandinavian countries with respect to double taxation preclude ad valorem property taxation of its aircraft in California. (See Convention and protocol between the United States of America and Sweden respecting double taxation, dated March 23, 1939, ratified August 2, 1939, proclaimed December 12, 1939, and effective January 1, 1940, 54 Stat. 1759, T.S. No. 958, 199 L.N.T.S. 17; Convention between the United States of America and Denmark respecting double taxation, dated May 6, 1948, and effective December 1, 1948, 62 Stat. 1730, T.I.A.S. No. 1854; Convention between the United States of America and the Kingdom of Norway for the avoidance of double taxation, dated June 13, 1949, 2 U.S.T. [1951] pt. 2, p.2323, T.I.A.S. No. 2357; 2 U.S.T. [1951] pt. 2, p. 2353, T.I.A.S. No. 2358.) It notes that each treaty provides that income from the operation of aircraft shall be taxed only in the home country of such aircraft (Treaty with Denmark, art. V; Treaty with Norway, art. V; Treaty with Sweden, art. IV). It contends that this policy of reciprocity on taxation of income connotes a like reciprocity as to local property taxation. There is no merit in plaintiff's contention. The draftsmen of the treaties were familiar with both national and local taxation of property as well as of income (Treaty with Sweden, art. I:

Treaty with Denmark, arts. I, XVI; Treaty with Norway, art. I), and they carefully specified the taxes to which the treaties applied and the limitations on the taxing powers of the respective nations. Under these circumstances it is not reasonable to infer that restrictions on income taxation connoted restrictions on property taxation; such an inference would require reading provisions into the treaties that were knowingly omitted.

It is contended, however, that article XIII of the Swedish treaty makes the rule governing income taxation applicable to the property taxes imposed on the Swedish-owned aircraft in this case. Article XIII provides:

"In the case of taxes on property or increment of property the following provisions shall be applicable:

"(1) If the property consists of: (a) Immovable property and accessories appertaining thereto; (b) Commercial or industrial enterprises, including maritime shipping and air transport undertakings: the tax may be levied only in that contracting State which is entitled under the preceding Articles to tax the income from such property.

"(2) In the case of all other forms of property, the tax may be levied only in that contracting State where the taxpayer has his residence or, in the case of a corporation or other entity, in the contracting State

where the corporation or other entity has been created or organized.

"The same principles shall apply to the United States capital stock tax with respect to corporations of Sweden having capital or other property in the United States of America."

Article XIII must be read together with article I, which provides:

"The taxes referred to in this Convention are:

"(a) In the case of the United States of America: (1) The Federal income taxes, including surtaxes and excess-profit taxes. (2) The Federal capital stock tax.

"(b) In the case of Sweden: (1) The National income and property tax, including surtax. (2) The National special property tax. (3) The communal income tax.

"It is mutually agreed that the present Convention shall also apply to any other or additional taxes imposed by either contracting State, subsequent to the date of signature of this Convention, upon substantially the same bases as the taxes enumerated herein. . . ."

Article I thus excludes local property taxation in the United States from the ambit of the treaty and makes clear, as the Senate Foreign Relations Committee stated in urging ratification of the treaty, that

"the United States makes no agreement respecting any of our State or local taxes." (Report of the Senate Foreign Relations Com., Exec. Rep. No. 18, 76th Cong., 1st Sess. 1939; see also Bittker and Ebb, Taxation of Foreign Income [1960], p. 512.) Had it been the intention to include such taxes, they would have been specifically mentioned as were the Swedish national property taxes and communal income tax. A matter so vital as restrictions on the taxing power of the states and their subdivisions would hardly have been left to implication from the provisions of article XIII, which are directly referable to Swedish property taxes and the United States capital stock tax.

An interpretation of article XIII as applicable only to the taxes defined in article I does not render the general language of article XIII governing property taxation meaningless insofar as the United States is concerned, for that language states the principles that shall also apply to the United States capital stock tax or "any other or additional taxes imposed by [the United States] subsequent to the date of signature of this Convention, upon substantially the same bases . . . " (Art. I.) Such an interpretation gives effect to both articles and avoids conflict between them. (See *City of Long Beach v. Vickers*,[1] 55 Cal.2d ——, [10 Cal. Rptr. 359, 358 P. 2d 687]; *Hough v. McCarthy*, 54 Cal. 2d 273, 279 [353 P. 2d 276].)

[1]Advance Report Citation: 55 A.C. 155, 164

Finally, plaintiff contends that the Legislature has not provided for the taxation of aircraft on an apportioned basis. Section 404 of the Revenue and Taxation Code provides that "All taxable property, except State assessed property, shall be assessed by the assessing agency of the taxing agency where the property is situated." (See also Rev. & Tax Code, §§ 201, 405.) The word "situated" in this section refers not to mere physical presence on tax day, but to the situs of property within the state necessary to give jurisdiction to tax. (*Brock & Co. v. Board of Supervisors*, 8 Cal. 2d 286, 289-290 [65 P. 2d 791, 110 A.L.R. 700].) Since a properly apportioned part of migratory property regularly used in interstate or foreign commerce in the state has such a situs, the Legislature has provided for its assessment and taxation. (See *Flying Tiger Line, Inc. v. County of Los Angeles*, 51 Cal. 2d 314 [333 P. 2d 323]; *Slick Airways v. County of Los Angeles*, 140 Cal. App. 2d 311 [295 P. 2d 46].)

It bears emphasis that this case involves, not the wisdom of local taxation of foreign aircraft flying in foreign commerce, but the question whether the United States Constitution prohibits a state from taxing such aircraft as it taxes other property that comes into the state. When, as here, there is no such constitutional prohibition, this court has no choice but to uphold the state constitution and statutes. It is not for us to determine whether reciprocal exemptions away from home and exclusive taxation at the domicile would

foster commerce, simplify tax administration, and fairly divide tax revenues among the jurisdictions that aircraft link. Such a decision involves policies that properly can be crystallized only in legislation or treaties. A court ventures beyond its appropriate bounds when it crystallizes its own views of tax policy as constitutional doctrine.

Gibson, C. J., concurred.

APPENDIX "B"

Opinion of the California District Court of Appeal
Reported 6 California Reporter 694

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

SCANDINAVIAN AIRLINES SYSTEM, INC., a New York Corporation,
Plaintiff and Respondent,
vs.
COUNTY OF LOS ANGELES, a political subdivision of the State of California, and CITY OF LOS ANGELES, a municipal corporation,
Defendants and Appellants.

Civil No. 24265

APPEAL from judgment of the Superior Court of Los Angeles County. Philbrick McCoy, Judge. Reversed with directions.

Harold W. Kennedy, County Counsel, Alfred Charles De Flon, Deputy County Counsel, for Appellants.

Musick, Peeler & Garrett, Roderick M. Hills, Richard D. Esbenshade, for Respondent.

Fox, Presiding Justice.

Plaintiff brought this suit to recover property taxes levied by both the City and County of Los Angeles against certain of plaintiff's planes employed in foreign commerce, which taxes had been paid by plaintiff under protest. Thirteen different aircraft belonging to plaintiff(SAS) were present in this county at one time or another during the period here in issue. The 13 aircraft made a total of 104 flights per year, or an average of 8 flights per plane. Each of the aircraft was registered and based in one of the three Scandinavian countries, Denmark, Norway or Sweden. As of the first Monday of March, 1955, the SAS service consisted of two flights per week into Los Angeles. Each week one plane would arrive in Los Angeles in the early afternoon on Tuesday and depart a day and one-half later on early Thursday morning, and another plane would arrive during early Saturday afternoon and would depart early on the following Monday morning. The only point in the United States with which said planes had physical contact was International Airport in Los Angeles.

Los Angeles City and County, as of the first Monday of March, 1955, assessed and levied a personal property tax upon these planes on an apportionment basis; that is, only a portion of the full value of the subject planes regularly entering Los Angeles County constituted the basis for the assessed valuation. That fraction of the total value of the aircraft equal to the hours spent in Los Angeles County as compared with the to-

tal hours in the year, was the basis upon which the tax was levied. Each of the aircraft is taxed in the country in which it was registered on an unapportioned basis.

Based on these facts, the trial court awarded judgment to SAS and the defendants County and City of Los Angeles have appealed.

SAS advances three grounds upon which it argues the judgment must be sustained: (1) that the tax violates due process; (2) that the tax is an unconstitutional regulation of foreign commerce; and (3) that there is no statutory authority for the tax.

We first consider the validity of the challenged tax with relation to the due process clause of the 14th Amendment to the Constitution of the United States. In this connection, the due process inquiry is whether the property taxed has acquired a situs in the taxing jurisdiction through having had sufficient contact with the jurisdiction. A further criterion is that the "... tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing State." (*Ott. v. Mississippi Valley Barge Line*, 336 U.S. 169.) See also *Braniff Airways, Inc. v. Nebraska State Bd. of Equalization*, 347 U.S. 590, 600; *Slick Airways, Inc. v. County of Los Angeles*, 140 Cal. App. 2d 311, 314, 295 P. 2d 46; and, *Flying Tiger Line Inc., v. County of Los Angeles*, 51 Cal. 2d 314, 319-320 333 P. 2d 323. In the *Braniff* case, *supra*, the Supreme Court said: "... [T]he bare question whether

an instrumentality of commerce has a tax situs in a state for the purpose of subjection to a property tax is one of due process." (347 U.S. at 598-599.)

SAS contends that their aircraft have acquired no tax situs in this state. Reliance is placed on the old "home port" doctrine cases to support this proposition, principally *Hays v. Pacific Mail S.S. Co.*, 58 U.S. (17 How.) 596; *Old Dominion S.S. Co. v. Virginia*, 198 U.S. 299; *Southern Pac. Co. v. Kentucky*, 222 U.S. 63; and *Morgan v. Parham*, 83 U.S. (16 Wall.) 471. These cases dealt with the tax situs of ocean going vessels engaged in commerce between states. The *Hays* case held a vessel taxable only by New York, its state of registry. This rule found support by way of dicta in the *Old Dominion* case, but the court nevertheless allowed Virginia to tax vessels which had a *permanent* situs in the state even though registered in another state. The *Southern Pac. Co.*, and *Morgan* cases allowed taxation only by the state of *domicile* of the owner on the rationale that no permanent situs had been developed in any other state and thus the vessels would escape taxation entirely unless taxed by the domiciliary state. This rule was also applied to vessels moving solely in inland waters. (*St. Louis v. Wiggins Ferry Co.*,78 U.S. (11 *Wall.*) 423; *Ayer & Lord Tie Co. v. Kentucky*, 202 U.S. 409.)

Clearly, the early rule was that permanent presence in the taxing jurisdiction was essential to the develop-

ment of a tax situs in a jurisdiction other than the state of domicile or registry, in so far as vessels engaged in interstate commerce were concerned. However, contemporaneously, a different rule developed with regard to the taxation of railroad rolling stock. (*Pullman's Palace Car Co. v. Pennsylvania,* 141 U.S. 18; *Union Refrigerator Transit Co. v. Kentucky,* 199 U.S. 194.) In these cases it was held that rolling stock engaged continuously in commerce between states could acquire a taxable situs in more than one state and that the taxable value of the property must be apportioned among the states in which the property had thus acquired a situs.

This rule of apportionment was later expanded to include vessels employed on inland waters in interstate commerce. In *Ott v. Mississippi Valley Barge Line, supra,* the court allowed Louisiana to levy an apportioned tax on tugs and barges which were domiciled in Ohio. The taxable situs in Louisiana developed through regular and substantial employment of the vessels in the waters of that state. Later, in *Standard Oil Co. v. Peck,* 342 U.S. 382, the Supreme Court adopted the rule that a domiciliary state could not tax the full value of property which was employed in interstate commerce and which was not physically present in the state of domicile during the entire tax year. The court said: "The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all of the property by the state of

domicile." Thus, the early cases involving vessels engaged in interstate commerce upon inland waters and allowing taxation only by the state of domicile have been, in effect, overruled.

Two Supreme Court cases in the field of air transportation have resulted in the application of the apportionment doctrine to interstate aircraft traffic. In *Northwest Airlines, Inc. v. Minnesota,* 322 U.S. 292, the court allowed an unapportioned tax on aircraft by the state of domicile even though the planes had substantial contacts with other states. However, in *Braniff Airways, Inc. v. Nebraska State Bd. of Equalization, supra,* 347 U.S. 590, an apportioned tax levied by Nebraska, a non-domiciliary state, on aircraft flown in interstate commerce was upheld. The *Northwest* case was distinguished on the ground that no proof of taxable situs elsewhere had been mad y the airline in that case. The court said at page 600 of 347 U.S.: "We perceive no logical basis for distinguishing the Constitutional power to impose a tax on such aircraft from the power to impose taxes on river boats." The test of taxable situs, said the court, is the "sufficiency of contact" of the non-domiciliary state with property it seeks to tax. The "sufficiency of contact" criterion was held to be satisfied by the fact that Braniff aircraft made an average of 18 stops per day in Nebraska. The court concluded: " 'The basis of the jurisdiction [to tax] is the habitual employment of the property within the State.' " (347 U.S. at 600.)

The application of the Braniff doctrine of "sufficiency of contact" to establish situs has been applied and expanded by the courts of this state. In *Flying Tiger Line, Inc. v. County of Los Angeles*, 51 Cal. 2d 314, 333 P. 2d 323, the taxpayer's aircraft operated in interstate and foreign commerce. Assuming that the planes had acquired a taxable situs elsewhere, merely from the fact that they were flown in interstate and in foreign commerce, after a review of the authorities, the Court held: "A taxpayer resisting an ad valorum tax on personal property based on an unapportioned assessment does not have the burden of showing that other states have actually imposed a tax on such property. He is entitled to an assessment on an apportionment basis if the record shows that he was, during a tax year, *receiving substantial benefits and protection in more than one state*." (51 Cal. 2d at 319, 333 P. 2 at 326.) (Emphasis added.)

Thus, the modern situs rule, as approved by the courts of this state, is that substantial benefits and protection have been accorded the property by the taxing state. The same result is reached by requiring a "sufficiency of contact" in line with the *Braniff* case since contact with a state results in the conferring of benefits and protection by the state contacted.

It is thus too clear for argument that the aircraft of SAS have established a taxable situs in the County of Los Angeles. It would seem therefore, that due pro

cess has been satisfied with respect to the tax in question. Yet this is not the whole answer. SAS argues that the imposition of any tax, whether fairly apportioned or not, is in reality a double tax and thus a denial of due process. Although the courts have consistently purported to limit the due process consideration to the "situs" and "fair apportionment based on benefits and protection" issues, there is language in both the *Standard Oil Co. v. Peck* and *Braniff Airways* cases which indicates that double taxation would constitute a denial of due process as well as an undue burden on commerce.[1]

We may not, however, consider the problem of multiply taxation with respect to any possible violation of due process in the taxation of property used in foreign commerce. It has long been settled in this state that the due process requirements of the 14th Amendment (with the exception of situs or power to tax) do not apply to taxes levied on the property of a resident

[1]In the *Standard Oil Co. v. Peck* case, the court stated that in the case of "multiple taxation of interstate operations . . . [such] tax would have *no relation to the opportunities, benefits, or protection which the taxing state gives those operations.*" (342 U.S. at 385.) Furthermore, the court in *Braniff* purported to decide the constitutionality of the tax on due process grounds. Yet the majority said, quoting *Curry v. McCanless*, 307 U.S. 357, 364: " 'When we speak of the jurisdiction to tax . . . we mean no more than that the *benefit and protection of laws* enabling the owner to enjoy the fruits of his ownership and the power to reach effectively the interests protected, for the purpose of subjecting them to payment of a tax, are so narrowly restricted to the state in whose territory the physical property is located as *to set practical limits to the taxation of others.*' " (347 U.S. 600.) (Emphasis added.) While the "benefit and protection of laws" is a due process concept, it would seem that the setting of "practical limits to taxation by others" involved a commerce clause concept of prevention of undue burdens on commerce.

It thus appears that multiple taxation as a constitutional concept overlaps both the due process and commerce fields of inquiry.

of a foreign country. On this point, *Estate of McCreery*, 220 Cal. 26, 29 P. 2d 186, 187, is opposite. In that case, McCreery had died testate, a resident and citizen of Great Britain. He died possessed of stock certificates representing shares in a California corporation, all of the shares being present in the State of California on the date of his death. Inheritance tax based on the value of these shares was assessed by court order, which order was later reversed by the same court. On appeal by the controller, the Supreme Court posed the following question to respective counsel: "Does the due process clause of the 14th Amendment to the Constitution of the United States prevent the State of California from collecting an inheritance tax on the transfer of stock in a California corporation in the estate of a non-resident of the United States, the certificates representing the stock being physically in the State of California?"

In answer to this question the court held that the 14th Amendment did not apply as between a state and a non-resident of the United States. The only requisite to the power to tax was the "*actual or constructive situs*" within the jurisdiction of the state. The possibility of taxation by Great Britain of the same property was thus no bar to taxation by California, even though, as between this state and residents of other states, the tax would be unconstitutional under the due process clause.

The court relied principally upon the case of *Burnett v. Brooks*, 288 U.S. 378, wherein the decedent was a British citizen domiciled in Cuba and died owning bonds and stocks, the physical evidences of which were all situated in New York State. The Supreme Court allowed a Federal estate tax on the property located in New York and held that the imposition of the tax was not precluded by the due process provisions of the 5th Amendment to the Constitution of the United States. The court in McCreery reasoned that likewise, the due process requirements of the 14th Amendment would not bar state taxation under similar circumstances. In accord is *Estate of Lloyd*, 185 Wash. 61, 52 P. 2d 1269.

Therefore, since the aircraft of SAS acquired a taxable situs in California, thereby establishing, for due process purposes, the power of California to levy a tax, the fact that the aircraft are subjected to a double tax becomes immaterial as a due process concept. The naked power exercised by the County is not disturbed by a necessity to avoid multiple taxation, in so far as it may constitute a denial of due process, since the owners are non-residents of the United States and are not protected by the 14th amendment.

We turn now to a consideration of the subject tax in the light of the prohibitions of the commerce clause of the Federal Constitution. The cases are in accord that (at least in interstate taxation) the threat of double taxation of the instrumentalities of commerce and

the undue burden thereby imposed, constitutes the relevant inquiry under the commerce clause. (*Braniff Airways, Inc. v. Nebraska State Bd. of Equalization*, 347 U.S. 590, 598.) SAS advances a further argument, however, contending that the Federal government has retained, under the commerce clause, exclusive jurisdiction and power in the field of taxation of foreign-flag carriers. In the absence of congressional action empowering the states to levy such taxes, the states may not act, they argue. Relying on the time-honored rule of *Cooley v. Board of Port Wardens*, 53 U.S. (12 How.) 299, that "[w]hatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress" (53 U.S. at 319), SAS contends that the taxation of foreign commerce is by "nature national" admitting "only of one uniform system, or plan of regulation" and thus requires "exclusive legislation by Congress."

The commerce clause of the Constitution of the United States (Art. I, Sec. 8, Cl. 3) provides that: "The congress shall have Power . . . to regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes." SAS points out, and correctly so, that even though interstate and foreign commerce are mentioned in the same clause, and in the same breath, yet the courts have recognized essential and basic differences between the two concepts and

have ascribed a larger share of exclusive jurisdiction to the Congress in the case of foreign as opposed to interstate commerce. (See, e.g. *Bowman v. Chicago & N. Ry.*, 125 U.S. 465, 482-83; *Brolan v. United States*, 236 U.S. 216, 222; *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 228, 229, Mr. Justice Johnson concurring: *Board of Trustees of Univ. of Ill. v. United States*, 289 U.S. 48, 56-57.)[2] These cases deny the power of a state to regulate foreign commerce or to have official rela-

[2]The Supreme Court of the United States has consistently held that states may not take action which affects the relations of this country with foreign governments. In *Bowman v. Chicago & N. Ry.*, 125 U.S. 465 at 482-483 the Court said: "Laws which concern the exterior relations of theUnited States with other Nations and governments are general in their nature, and should proceed exclusively from the legislative authority of the Nation. The organization of our state and federal system of government is such that the people of the several states can have no relations with *foreign powers in respect to commerce* or any other subject, except through the Government of the United States, and its laws and treaties . . . The same necessity perhaps does not exist equally in reference to *commerce among the States*." (Emphasis added.)

In *Brolan v. United States*, 236 U.S. 216, the Court reaffirmed the sweeping distinction between the power of Congress over foreign commerce as opposed to interstate commerce. At page 222 of 236 U.S., the Court stated: ". . . but the very postulate upon which the action of Congress to absolutely prohibit foreign importation . . . rests in the *broad distinction* which exists between the two powers . . ."

Mr. Chief Justice Hughes speaking for the Court in *Board of Trustees of Univ. of Ill. v. United States*, 289 U.S. 48 said at pages 56-57, said: "It is an essential attribute of the power [over foreign commerce] that it is exclusive and plenary. As an exclusive power, its exercise may not be limited, qualifed or impeded to any extent by state action . . . The principle of duality in our system of government does not touch the authority of the Congress in the regulation of foreign commerce."

Perhaps the most cogent discussion of the essential distinction between Congress' power over foreign as opposed to interstate commerce is to be found in the concurring opinion of Mr. Justice Johnson in *Gibbons v. Ogden*, 22 U.S (9 Wheat) 1, appearing at pages 228-229. He said: "Power to regulate foreign commerce is given in the same words, and in the same breath . . . with that over the commerce of the state . . . But the power to regulate foreign commerce is necessarily exclusive. The states ar unknown to foregin nations: their sovereignty exists only with relation to each other and the general government. Whatever regulations foreign commerce should be subjected to in the ports of the Union, the general government would be held as responsible for them; and all other regulations, but those which Congress had imposed, *would be regarded by foreign nations as trespasses and violations of national faith and comity*." (Emphasis added.) See also *Buttfield v. Stranahan*, 192 U.S. 470, 492, *Chy Lung v. Freeman*, 92 U.S. 275, 279-80, and *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 434.

tions with foreign governments. However, nowhere in the cases is there a prohibition of the taxation of the instrumentalities of foreign commerce by a state because of any exclusive power to levy such a tax residing in congress. On the contrary, three decided cases have expressly recognized that power exists in the several states to tax such instrumentalities. In *Old Dominion S.S. Co. v. Virginia, supra,* 198 U.S. 299 at p. 305, the Court held: "It is equally well settled that there is nothing in the Constitution or laws of the United States which prevents a state from taxing personal property, employed in interstate or *foreign* commerce, like other personal property within its jurisdiction." (Emphasis added.) See, e.g., *Western Union Telegraph Co. v. Taggart,* 163 U.S. 1, 14. The *Old Dominion* case was quoted with approval by the Washington Supreme Court in *Canadian Pacific Ry. Co. v. King County,* 90 Wash. 38, 155 P. 416, wherein the court held valid property taxes levied by King County of the State of Washington on rolling stock owned by the Canadian Pacific Railway Company, a foreign corporation and engaged in foreign commerce. It seems clear, therefore, that the tax levied in this State was not prohibited by the commerce clause because of any actual exclusive control over the taxing power residing in the Congress.

There remains for our consideration the question as to whether or not the tax in question violates the commerce clause by imposing a multiple tax on the in-

strumentalities of foreign commerce. The Los Angeles County tax does in fact constitute a multiple tax since the aircraft are admittedly taxed at their full value in their home countries. The specific problem before us is to determine whether the local tax constitutes a regulation of foreign commerce by imposing an undue burden thereon.

A direct burden by taxation laid by a state upon the transactions of foreign commerce is in effect a regulation of commerce. (*Crew Levick Co. v. Pennsylvania*, 245 U.S. 292, 297.) Thus, when a court speaks of burdens on commerce, it also speaks of an unconstitutional regulation of commerce. The test of such "regulation" was announced in *Postal Teleg. Cable Co. v. Adams*, 155 U.S. 688. Mr. Chief Justice Fuller, speaking for the Court, said: "It is settled that where, by way of duties laid on the transportation of the *subjects* of interstate commerce, or on the *receipts* derived therefrom, or on the *occupation or business of carrying it on*, a tax is levied by a state on interstate commerce, such taxation amounts to a regulation of such commerce and cannot be sustained." (Emphasis added.) It should be clear, that the above rule *does not* include taxes levied on the instrumentalities of commerce. Nor is it material that the rule as announced was specifically directed toward interstate commerce. In a case involving taxation of the gross volume of business of an exporter, the Supreme Court considered the tax as a burden on foreign commerce and thus as an un-

constitutional regulation. (*Crew Levick Co. v. Pennsylvania, supra.*) In reaching this result, the Court applied the principles enunciated in the interstate cases, holding at page 296 of 245 U.S.: "Most of these cases related to interstate commerce, but there is no difference between this and foreign commerce, so far as the present question is concerned." See e.g., *Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69. The Court then distinguished the tax before it from a "property tax", implying that the latter would not constitute a regulation of commerce. It thus seems clear that a tax on property engaged in foreign commerce is not, per se, a regulation or burden on such commerce.

But this is, of course, not the complete answer to the problem posed by this case. Double taxation has been held to constitute an undue burden on interstate commerce. (*J. D. Adams Mfg. Co. v. Storen*, 304 U.S. 307, 311.) In fact the whole apportionment doctrine discussed *supra* seems designed to avoid such a result. (*Braniff Airways, Inc. v. Nebraska State Bd. of Equalization, supra*, 347 U.S. 590, 601; *Flying Tiger Line, Inc. v. County of Los Angeles, supra*, 51 Cal. 2d 314, 333 P. 2d 323.) Yet apportioned taxes based upon "sufficiency of contact" and fairly relating to "benefits and protections conferred" have been held valid even though such taxes were in fact double taxation of the chattels involved. (*Ott v. Mississippi Barge Line Co., supra*, 336 U.S. 169; *Standard Oil Co. v. Peck, supra*, 342 U.S. 382.) The rationale of these cases is not

based on the necessity to avoid double taxation but, rather, on the recognition of the non-domiciliary state's right to fair compensation for the benefits and protections afforded the taxpayer. The power to tax flows from the presence of the property in the taxing state and the concomitant privileges enjoyed by its owners while thus employed within the jurisdiction. It is the unfairness of the original "domicile" or "permanent presense" doctrines as applied to transient carriers which prompted the present rule of apportionment. Surely, the older rules insured that no double tax would result, for only one jurisdiction could tax. Just as surely, the apportionment theory leads to the distinct possibility of double taxation through the utilization of different apportionment formulas. Thus, the onus of double taxation falls, not on the jurisdiction levying a fairly apportioned tax, but upon the domicilary jurisdiction which refuses to apportion its taxes on the basis of benefits and protections actually conferred.[3] The conclusion appears to be clear that any burdens imposed upon SAS in its foreign commerce operations by the incidence of double taxation of its aircraft, flows from the full ad valorum tax assessed by the countries of registry which does not correspond

[3]Apportioned taxation by a non-domiciliary state was allowed in *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169 and *Pullman's Palace Car Co. v. Pennsylvania*, 141 U.S. 18.

When the burden on taxpayers caused by unapportioned taxes in domiciliary states has been before the courts, those jurisdictions have been required to apportion their taxes. See, e.g. *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194; *Flying Tiger Line v. County of L.A.*, 51 Cal. 2d 314, 333 P. 2d 323

to the benefits and protections afforded such aircraft in those countries. Since the root of the evil is to be found in foreign soil, the sovereign power of this state is not poisoned by the fruit.

We agree with our Supreme Court in *Estate of McCreery, supra*, that " . . . it seems peculiarly proper at this juncture to follow our own decisions until the federal courts rule that such taxation is without the power of the state." (220 Cal. at 31, 29 P. 2d 188.)

All of the constitutionally essential requisites are present in this tax. The property taxed was physically present in this state on a regular schedule creating a "sufficiency of contract" which establishes situs. The tax as levied is fairly apportioned to correspond to the benefits and protections afforded. The County has the power to tax the instrumentalities of foreign commerce, and the tax as imposed does not violate due process nor constitute an undue burden on foreign commerce. Thus, the language of Mr. Justice Stone, dissenting in *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, at 326 seems particularly pertinent:[4] "The extent to which one state may constitutionally tax the instruments of interstate transportation does not depend on what other states may happen to do, but on what the taxing state has constitutional power to do."

[4]This language takes on greater significance because of the Supreme Court's decision in the *Braniff Airways* case which strongly modified the holding in the *Northwest* case and because of the California rule as announced in the *Flying Tiger* and *Slick* cases, approving and following the *Braniff* rule. The minority in *Northwest* enunciated what has become the majority rule today.

See also *Standard Oil v. Peck, supra,* and *Central Greyhound Lines, Inc. v. Mealey,* 334 U.S. 653. Likewise, the power of a state to tax the instrumentalities of foreign commerce should not depend upon what the home country has chosen to do, but upon what the state, under the Constitution of the United States, and its own laws has the power to do.

SAS makes one further contention with relation to the commerce clause: i.e., that the Federal government has so completely occupied the field of regulation of foreign air traffic that the present tax conflicts with such Federal regulation and is therefore void under the supremacy clause of the United States Constitution. In this connection, suffice it to say that we have examined the applicable statutes, rules, treaties, regulations, protocols and executive agreements which constitute the Federal governments controls over foreign commerce and in particular, over SAS, and that we find no mention of tax on personal property nor evidence of any intention of the Federal Government to regulate in the area of such taxation. There simply is no Federal occupancy of this field. The argument is therefore lacking in foundation.

The final argument made by SAS is that there is no statutory authority in this State providing for taxation of the instrumentalities of foreign commerce. However, California Constitution, Article XIII, Sec. 1 provides: "All property in the State . . . not exempt

under the laws of the United States shall be taxed in proportion to its value . . ." Further, Article XIII, Sec. 10, provides that: "All property . . . shall be assessed in the County, City and County, town or township or district in which it is situated." (See also Sections 201 and 405 of the Rev. and Tax. Code.) Thus, the Constitution of this State *requires* that all property not exempt be taxed and the tax to be levied in the jurisdiction wherein the property acquires a situs. The legislature provides the machinery for taxation or may, by statute, exempt certain property (Art. XIII; Sec. 14, par. 4, California Constitution.), but the *power* to tax all property resides in each jurisdiction by virtue of the Constitution. No statutory authority is therefore necessary to establish this *power*. See, e.g., *Crocker v. Scott*, 149 Cal. 575, 584; *McHenry v. Downer*, 116 Cal. 20, 24. Moreover, the provisions of the Revenue & Taxation Code, particularly §§ 201, 404 and 405, provide adequate machinery for the exercise of the Constitutional power that has been granted.

Furthermore, in the *Stick* and *Flying Tiger* cases, *supra*, apportioned taxation (even in the absence of specific enabling legislation) was applied by the courts as the correct rule of assessment for property engaged in interstate and foreign commerce. The value of the aircraft for tax purposes is thus determined on the basis of the actual physical presence of the aircraft in the County. This is the rule announced in the *Flying*

Tiger case and we see no valid reason to question the County's power to levy an apportioned tax in the *face of the Supreme Court's assumption that such power exists.*

The tax is not invalid under the Constitution of the United States or this State, nor does the City or County lack legal authority to levy it. The judgment must therefore be reversed.

The judgment is reversed with directions to enter judgment for the defendants.

FOX, *P. J.*

We concur:

ASHBURN, *J.*
RICHARDS, *J. Pro tempore.*

APPENDIX "C"

Convention and Protocol Between the United States of America and Sweden

[54 Stat. 1759, U.S. Treaty Series No. 958]

(Ratification advised by the Senate of the United States August 2, 1939; ratified by President of the United States September 8, 1939; ratified by Sweden August 21, 1939; effective January 1, 1940.)

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

Whereas a convention between the United States of America and Sweden for the avoidance of double taxation and the establishment of rules of reciprocal administrative assistance in the case of income and other taxes, and a protocol forming an integral part of the said convention, were concluded and signed by their respective Plenipotentiaries at Washington on the twenty-third day of March, one thousand nine hundred and thirty-nine, the original of which convention and protocol being in the English and Swedish languages, are word for word as follows [the Swedish version is omitted herefrom]:

The President of the United States of America and His Majesty the King of Sweden, being desirous of avoiding double taxation and of establishing rules of

reciprocal administrative assistance in the case of income and other taxes, have decided to conclude a Convention and for that purpose have appointed as their respective Plenipotentiaries:—

The President of the United States of America:

Sumner Welles, Acting Secretary of State of the United States of America; and

His Majesty the King of Sweden:

W. Boström, Envoy Extraordinary and Minister Plenipotentiary at Washington;

who, having communicated to one another their full powers found in good and due form, have agreed upon the following Articles:

Article I

The taxes referred to in this Convention are:

(a) In the case of the United States of America:

(1) The Federal income taxes, including surtaxes and excess-profits taxes.

(2) The Federal capital stock tax.

(b) In the case of Sweden:

(1) The National income and property tax, including surtax.

(2) The National special property tax.

(3) The communal income tax.

It is mutually agreed that the present Convention shall also apply to any other or additional taxes imposed by either contracting State, subsequent to the date of signature of this Convention, upon substantially the same bases as the taxes enumerated herein.

The benefits of this Convention shall accrue only to citizens and residents of the United States of America, to citizens and residents of Sweden and to United States or Swedish corporations and other entities.

Article II

An enterprise of one of the contracting States is not subject to taxation by the other contracting State in respect of its industrial and commercial profits except in respect of such profits allocable to its permanent establishment in the latter State. The income thus taxed in the latter State shall be exempt from taxation in the former State.

No account shall be taken, in determining the tax in one of the contracting States, of the mere purchase of merchandise effected therein by an enterprise of the other State.

The competent authorities of the two contracting States may lay down rules by agreement for the apportionment of industrial and commercial profits.

Article III

When an enterprise of one of the contracting States, by reason of its participation in the management or capital of an enterprise of the other contracting State, makes or imposes on the latter in their commercial or financial relations conditions different from those which would be made with an independent enterprise, any profits which should normally have appeared in the balance sheet of the latter enterprise but which have been in this manner diverted to the former enterprise may, subject to applicable measures of appeal, be incorporated in the taxable profits of the latter enterprise. In such case consequent rectifications may be made in the accounts of the former enterprise.

Article IV

Income which an enterprise of one of the contracting States derives from the operation of ships or aircraft registered in that State is taxable only in the State in which registered. Income derived by such an enterprise from the operation of ships or aircraft not so registered shall be subject to the provisions of Article II.

Article V

Income of whatever nature derived from real property, including gains derived from the sale of such property, but not including interest from mortgages or

bonds secured by real property, shall be taxable only in the contracting State in which the real property is situated.

Article VI

Royalties from real property or in respect of the operation of mines, quarries, or other natural resources shall be taxable only in the contracting State in which such property, mines, quarries, or other natural resources are situated.

Other royalties and amounts derived from within one of the contracting States by a resident or by a corporation or other entity of the other contracting State as consideration for the right to use copyrights, patents, secret processes and formulas, trade-marks and other analogous rights, shall be exempt from taxation in the former State.

Article VII

1. Dividends shall be taxable only in the contracting State in which the shareholder is resident or, if the shareholder is a corporation or other entity, in the contracting State in which said corporation or other entity is created or organized; provided, however, that each contracting State reserves the right to collect and retain (subject to applicable provisions of its revenue laws) the taxes which, under its revenue laws, are deductible at the source, but not in excess of 10 per centum of the amount of such dividends. For the pur-

poses of this Article the National income and property tax imposed by Sweden shall be deemed to be a tax deducted at the source.

2. Notwithstanding the provisions of Article XXII of this Convention, the provisions of this Article may be terminated by either of the contracting States at the end of two years from the date upon which this Convention enters into force or at any time thereafter, provided at least six months' prior notice of termination is given, such termination to become effective on the first day of January following the expiration of such six-month period. In the event the provisions of this Article are terminated, the provision of—

(1) Article XIII (2), in so far as they relate to the special property tax imposed by Sweden upon shares in a corporation;

(2) Article XIV (b) (2), relating to the allowance of an additional deduction from taxes on dividends; and

(3) Article XVI, in so far as they relate to exchange of information with respect to dividends,

will likewise terminate.

Article VIII

Interest on bonds, notes, or loans shall be taxable only in the contracting State in which the recipient of such interest is a resident or, in the case of a corporation or other entity, in the State in which the corporation or other entity is created or organized; pro-

vided, however, that each contracting State reserves the right to collect and retain (subject to applicable provisions of its revenue laws) the taxes which, under its revenue laws, are deductible at the source.

Article IX

Gains derived in one of the contracting States from the sale or exchange of capital assets by a resident or a corporation or other entity of the other contracting State shall be exempt from taxation in the former State, provided such resident or corporation or other entity has no permanent establishment in the former State.

Article X

Wages, salaries and similar compensation and pensions paid by one of the contracting States or by the political subdivisions or territories or possessions thereof to individuals residing in the other State shall be exempt from taxation in the latter State.

Private pensions and life annuities derived from within one of the contracting States and paid to individuals residing in the other contracting State shall be exempt from taxation in the former State.

Article XI

(a) Compensation for labor or personal services, including the practice of the liberal professions, shall be taxable only in the contracting State in which such services are rendered.

(b) The provisions of paragraph (a) are, however, subject to the following exceptions:

A resident of Sweden shall be exempt from United States tax upon compensation for labor or personal services performed within the United States of America if he falls within either of the following classifications:

1. He is temporarily present within the United States of America for a period or periods not exceeding a total of one hundred eighty days during the taxable year and his compensation is received for labor or personal services performed as an employee of, or under contract with, a resident or corporation or other entity of Sweden; or

2. He is temporarily present in the United States of America for a period or periods not exceeding a total of ninety days during the taxable year and the compensation received for such services does not exceed $3,000.00 in the aggregate.

In such cases Sweden reserves the right to the taxation of such income.

(c) The provisions of paragraph (b) of this Article shall apply, mutatis mutandis, to a resident of the United States of America deriving compensation for personal services performed within Sweden.

(d) The provisions of paragraphs (b) and (c) of this Article shall have no application to the professional earnings of such individuals as actors, artists, musicians and professional athletes.

(e) The provisions of this Article shall have no application to the income to which Article X relates.

Article XII

Students or business apprentices from one contracting State residing in the other contracting State exclusively for purposes of study or for acquiring business experience shall not be taxable by the latter State in respect of remittances received by them from within the former State for the purposes of their maintenance or studies.

Article XIII

In the case of taxes on property or increment of property the following provisions shall be applicable:

(1) If the property consists of:

(a) Immovable property and accessories appertaining thereto;

(b) Commercial or industrial enterprises, including maritime shipping and air transport undertakings;

the tax may be levied only in that contracting State which is entitled under the preceding Articles to tax the income from such property.

(2) In the case of all other forms of property, the tax may be levied only in that contracting State where the taxpayer has his residence or, in the case of a corporation or other entity, in the contracting State where

the corporation or other entity has been created or organized.

The same principles shall apply to the United States capital stock tax with respect to corporations of Sweden having capital or other property in the United States of America.

Article XIV

It is agreed that double taxation shall be avoided in the following manner:

(a) Notwithstanding any other provision of this Convention, the United States of America in determining the income and excess-profits taxes, including all surtaxes, of its citizens or residents or corporations, may include in the basis upon which such taxes are imposed all items of income taxable under the revenue laws of the United States of America as though this Convention had not come into effect. The United States of America shall, however, deduct the amount of the taxes specified in Article I (b)(1) and (3) of this Convention or other like taxes from the income tax thus computed but not in excess of that portion of the income tax liability which the taxpayer's net income taxable in Sweden bears to his entire net income.

(b)(1) Notwithstanding any other provision of this Convention, Sweden, in determining the graduated tax on income and property of its residents or corporations or other entities, may include in the basis upon which such tax is imposed all items of income and prop-

erty subject to such tax under the taxation laws of Sweden. Sweden shall, however, deduct from the tax so calculated that portion of such tax liability which the taxpayer's income and property exempt from taxation in Sweden under the provisions of this Convention bears to his entire income and property.

(2) There shall also be allowed by Sweden from its National income and property tax a deduction offsetting the tax deducted at the source in the United States of America, amounting to not less than 5 per centum of the dividends from within the United States of America and subject to such tax in Sweden. It is agreed that the United States of America shall allow a similar credit against the United States income tax liability of citizens of Sweden residing in the United States of America.

Article XV

With a view to the more effective imposition of the taxes to which the present Convention relates, each of the contracting States undertakes, subject to reciprocity, to furnish such information in the matter of taxation, which the authorities of the State concerned have at their disposal or are in a position to obtain under their own law, as may be of use to the authorities of the other State in the assessment of the taxes in question and to lend assistance in the service of documents in connection therewith. Such information and correspondence relating to the subject matter of this

Article shall be exchanged between the competent authorities of the contracting States in the ordinary course or on demand.

Article XVI

1. In accordance with the preceding Article, the competent authorities of the United States of America shall forward to the competent authorities of Sweden as soon as practicable after the close of each calendar year the following information relating to such calendar year:

(a) The names and addresses of all addressees within Sweden deriving from sources within the United States of America dividends, interest, royalties, pensions, annuities, or other fixed or determinable annual or periodical income, showing the amount of such income with respect to each addressee;

(b) Any particulars which the competent United States authorities may obtain from banks, savings banks or other similar institutions concerning assets belonging to individuals resident in Sweden or to Swedish corporations or other entities;

(c) Any particulars which the competent United States authorities may obtain from inventories in the case of property passing on death concerning debts contracted with individuals resident in Sweden or Swedish corporations or other entities.

2. The competent authorities of Sweden shall forward to the competent authorities of the United States of America as soon as practicable after the close of each calendar year the following information relating to such calendar year:

(a) The particulars contained in the forms delivered to the Swedish authorities in connection with the payment to individuals or corporations or other entities whose addresses are within the United States of America of dividends on shares in a corporation or participation certificates in co operative societies, and interest on bonds or other similar securities;

(b) The particulars contained in permits accorded to individuals resident in the United States of America or to United States corporations or other entities to enable them to acquire for business purposes immovable property situated in Sweden;

(c) Any particulars which the central Swedish authorities may obtain from banks, savings banks or other similar institutions concerning assets belonging to individuals resident in the United States of America or to United States corporations or other entities;

(d) Any particulars which the central Swedish authorities may obtain from inventories in the case of property passing on death, concerning debts contracted with individuals resident in the United States of America, or United States corporations or other entities;

(e) A list of the names and addresses of all United States citizens resident in the United States

of America who have made declarations to the Central Committee in Stockholm in charge of the taxation of taxpayers not resident in Sweden for purposes of the Swedish tax on income and property;

(f) Particulars concerning annuities and pensions, public or private, paid to individuals resident in the United States of America.

Article XVII

Each contracting State undertakes, in the case of citizens or corporations or other entities of the other contracting State, to lend assistance and support in the collection of the taxes to which the present Convention relates, together with interest, costs and additions to the taxes and fines not being of a penal character. The contracting State making such collection shall be responsible to the other contracting State for the sums thus collected.

In the case of applications for enforcement of taxes, revenue claims of each of the contracting States which have been finally determined shall be accepted for enforcement by the other contracting State and collected in that State in accordance with the laws applicable to the enforcement and collection of its own taxes. The State to which application is made shall not be required to enforce executory measures for which there is no provision in the law of the State making the application.

The applications shall be accompanied by such documents as are required by the laws of the State making the application to establish that the taxes have been finally determined.

If the revenue claim has not been finally determined the State to which application is made may, at the request of the other contracting State, take such measures of conservancy as are authorized by the revenue laws of the former State.

Article XVIII

The competent authority of each of the contracting States shall be entitled to obtain, through diplomatic channels, from the competent authority of the other contracting State, particulars in concrete cases relative to the application to citizens or to corporations or other entities of the former State, of the taxes to which the present Convention relates. With respect to particulars in other cases, the competent authority of each of the contracting States will give consideration to requests from the competent authority of the other contracting State.

Article XIX

In no case shall the provisions of Article XVII, relating to mutual assistance in the collection of taxes, or of Article XVIII, relating to particulars in concrete cases, be construed so as to impose upon either of the contracting States the obligation

(1) to carry out administrative measures at variance with the regulations and practice of either contracting State, or

(2) to supply particulars which are not procurable under its own legislation or that of the State making application.

The State to which application is made for information or assistance shall comply as soon as possible with the request addressed to it. Nevertheless, such State may refuse to comply with the request for reasons of public policy or if compliance would involve violation of a business, industrial or trade secret or practice. In such case it shall inform, as soon as possible, the State making the application.

Article XX

Where a taxpayer shows proof that the action of the revenue authorities of the contracting States has resulted in double taxation in his case in respect of any of the taxes to which the present Convention relates, he shall be entitled to lodge a claim with the State of which he is a citizen or, if he is not a citizen of either of the contracting States, with the State of which he is a resident, or, if the taxpayer is a corporation or other entity, with the State in which it is created or organized. Should the claim be upheld, the competent authority of such State may come to an agreement with the competent authority of the other State with a view

to equitable avoidance of the double taxation in question.

Article XXI

The competent authorities of the two contracting States may prescribe regulations necessary to interpret and carry out the provisions of this Convention. With respect to the provisions of this Convention relating to exchange of information, service of documents and mutual assistance in the collection of taxes, such authorities may, by common agreement, prescribe rules concerning matters of procedure, forms of application and replies thereto, conversion of currency, disposition of amounts collected, minimum amounts subject to collection and related matters.

Article XXII

The present Convention shall be ratified, in the case of the United States of America, by the President, by and with the advice and consent of the Senate, and in the case of Sweden, by His Majesty the King, with the consent of the Riksdag. The ratifications shall be exchanged at Stockholm.

This Convention shall become effective on the first day of January following the exchange of the instruments of ratification and shall apply to income realized and property held on or after that date. The Convention shall remain in force for a period of five years and indefinitely thereafter but may be terminated by

either contracting State at the end of the five-year period or at any time thereafter, provided at least six months' prior notice of termination has been given, the termination to become effective on the first day of January following the expiration of the six-month period.

In witness whereof the respective Plenipotentiaries have signed this Convention and have affixed their seals hereto.

Done in duplicate, in the English and Swedish languages, both authentic, at Washington, this twenty-third day of March, nineteen hundred and thirty-nine.

For the President of the United States of America:

SUMNER WELLES [SEAL]

For His Majesty the King of Sweden:

W. BOSTRÖM [SEAL]

PROTOCOL.

At the moment of signing the Convention for the avoidance of double taxation, and the establishment of rules of reciprocal administrative assistance in the case of income and other taxes, this day concluded between the United States of America and Sweden, the undersigned Plenipotentiaries have agreed that the following provisions shall form an integral part of the Convention:

(1) As used in this Convention:

(a) The term "permanent establishment" includes branches, mines and oil wells, plantations, factories, workshops, warehouses, offices, agencies, installations, and other fixed places of business of an enterprise but does not include the casual or temporary use of merely storage facilities. A permanent establishment of a subsidiary corporation shall not be deemed to be a permanent establishment of the parent corporation. When an enterprise of one of the contracting States carries on business in the other State through an employee or agent, established there, who has general authority to contract for his employer or principal, it shall be deemed to have a permanent establishment in the latter State. But the fact that an enterprise of one of the contracting States has business dealings in the other State through a bona fide commission agent, broker or custodian shall not be held to mean that such enterprise has a permanent establishment in the latter State.

(b) The term "enterprise" includes every form of undertaking whether carried on by an individual, partnership, corporation, or any other entity.

(c) The term "enterprise of one of the contracting States" means, as the case may be, "United States enterprise" or "Swedish enterprise."

(d) The term "United States enterprise" means an enterprise carried on in the United States of America by a resident of the United States of America or by a United States corporation or other entity; the term "United States corporation or other entity" means a partnership, corporation or other entity created or organized in the United States of America or under the law of the United States of America or of any State or Territory of the United States of America.

(e) The term "Swedish enterprise" is defined in the same manner, mutatis mutandis, as the term "United States enterprise."

2. The term "corporation" includes associations, joint-stock companies, and insurance companies.

3. A citizen of one of the contracting States not residing in either shall be deemed, for the purpose of this Convention, to be a resident of the contracting State of which he is a citizen.

When doubt arises with respect to residence or with respect to the taxable status of corporations or other entities, the competent authorities of the two contracting States may settle the question by mutual agreement.

4. The provisions of Swedish law concerning the taxation of the undivided estates of deceased persons shall not apply where the beneficiaries are directly liable to taxation in the United States of America.

5. The term "life annuities" referred to in Article X of this Convention means a stated sum payable periodically at stated times during life, or during a specified number of years, under an obligation to make the payments in consideration of a gross sum paid for such obligation.

6. The Swedish so-called "fees tax" (bevillningsavgift for vissa offentliga forestallningar) based on gross income in so far as it affects such individuals as actors, artists, musicians and professional athletes shall be deemed to be an income tax for the purposes of Article XIV (a).

The credit for taxes provided in Article XIV shall have no application to taxes deducted at the source from dividends and interest except to the extent provided in paragraph (b) (2) of that Article.

In the application of the provisions of this Convention the benefits of section 131 of the United States Revenue Act of 1938, relating to credits for foreign taxes, shall be accorded, but the credit provided for in Article XIV (a) shall not extend to United States excess-profits taxes nor to the sur-tax imposed on personal holding companies.

7. Citizens of each of the contracting States residing within the other contracting State shall not be subjected in the latter State to other or higher taxes than are imposed upon the citizens of such latter State.

8. The provisions of this Convention shall not be construed to deny or affect in any manner the right of diplomatic and consular officers to other or additional exemptions now enjoyed or which may hereafter be granted to such officers, nor to deny to either of the contracting States the right to subject to taxation its own diplomatic and consular officers.

9. The provisions of the present Convention shall not be construed to restrict in any manner any exemption, deduction, credit or other allowance accorded by the laws of one of the contracting States in the determination of the tax imposed by such State.

10. In the administration of the provisions of this Convention relating to exchange of information, service of documents, and mutual assistance in collection of taxes, fees and costs incurred in the ordinary course shall be borne by the State to which application is made but extraordinary costs incident to special forms of procedure shall be borne by the applying State.

11. Documents and other communications or information contained therein, transmitted under the provisions of this Convention by one of the contracting States to the other contracting State shall not be published, revealed or disclosed to any person except to

the extent permitted under the laws of the latter State with respect to similar documents, communications or information.

12. As used with respect to revenue claims in Article XVII of this Convention the term "finally determined" shall be deemed to mean:

(a) In the case of Sweden, claims which have been finally established, even though still open to revision by exceptional procedure;

(b) In the case of the United States of America, claims which are no longer appealable, or which have been determined by decision of a competent tribunal, which decision has become final.

13. As used in this Convention the term "competent authority" or "competent authorities" means, in the case of the United States of America, the Secretary of the Treasury and in the case of Sweden, the Finance Ministry.

14. The term "United States of America" as used in this Convention in a geographical sense includes only the States, the Territories of Alaska and Hawaii, and the District of Columbia.

15. Should any difficulty or doubt arise as to the interpretation or application of the present Convention, or its relationship to Conventions between one of the contracting States and any other State, the competent authorities of the contracting States may settle the question by mutual agreement.

16. The present Convention and Protocol shall not be deemed to affect the exchange of notes between the United States of America and Sweden providing relief from double income taxation on shipping profits, signed March 31, 1938.

Done at Washington, this twenty-third day of March, nineteen hundred and thirty-nine.

SUMNER WELLES [SEAL]
W. BOSTKÖM [SEAL]

AND WHEREAS the said convention and the said protocol have been duly ratified on both parts and the ratifications of the two Governments were exchanged at Stockholm on the fourteenth day of November, one thousand nine hundred and thirty-nine;

AND WHEREAS, as is provided in Article XXII, the said convention shall become effective on the first day of January following the exchange of the instruments of ratification;

NOW, THEREFORE, be it known that I, Franklin D. Roosevelt, President of the United States of America, have caused the said convention and the said protocol to be made public to the end that the same and every article, clause and part thereof may be observed and fulfilled with good faith by the United States of America and the citizens thereof on and from the first day of January, one thousand nine hundred and forty.

IN TESTIMONY WHEREOF, I have hereunder set my hand and caused the Seal of the United States of America to be affixed.

DONE at the City of Washington this twelfth day of December, in the year of our Lord one thousand nine hundred and thirty-nine, and of the Independence of the United States of America the one hundred and sixty-fourth.

[SEAL]

FRANKLIN D. ROOSEVELT

By the President:

CORDELL HULL

Secretary of State.